SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, A. D. 1901.

NO. 80.

THE MIDWAY COMPANY,
Plaintiff in Error,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN AND MARGARETHA LONSTORF.
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR FRANK W. EATON and MARGARETHA LONSTORF.

ARGUMENT.

I.

Counsel for the respective defendants, in the preparation of their briefs have endeavored, in so far as it was practicable, to avoid unnecessary repe-

tition and save the court as much work as possible, and for that reason have joined in a statement of the facts and an outline of the positions of the respective parties to the suit, which will be found in the brief of Mr. J. L. Washburn.

It has also been arranged between counsel for the respective defendants that certain points in the case should be argued more at length in one or the other of the briefs and barely touched upon in the other. By this method, counsel, who represent different defendants, have been permitted to present the case to the court from their own peculiar standpoint, while at the same time we are satisfied that the two briefs are but little greater in length than a single brief would have been which combined the views of both counsel.

This action is in effect a judicial review of Secretary Vilas' decision in the case of Hyde vs Eaton, and as that decision turned upon the construction of the Act of 1854, a thorough understanding of the nature and purpose of that act is necessary in order properly to consider and rightly determine this case.

NATURE AND PURPOSE OF ACT OF 1854.

The Secretary assumes that congress, in passing the Act of 1854, had the same general idea in view as in the passage of the pre-emption and homestead acts; for in his decisions in these scrip cases, he has applied the same rules of construction that

obtain in the administration of the public land laws. In the case of Allen vs. Merrill, 8 L. D., on page 219, he says:

> "And although the same words were not employed with respect to the Indians which are found in the statutes concerning the settlement of citizens upon the public lands, yet it was intended, keeping in view the difference between Indians and civilized persons, *to express the same general idea.*" (Italics our own.)

Herein lies the fundamental error of the Secretary's position.

There is no analogy, whatever, between the purposes of the Act of 1854 and the pre-emption and homestead acts.

The sole purpose congress had in view in passing this act was to permit the government to obtain possession of the land occupied by these half-breeds, and throw it open to public settlement.

The Supreme Court of Minnesota, in the case of Monette vs. Cratt, on page 184, Gilfillan edition, referring to this act, says:

> "The main object of the Act of July 17th, 1854, appears to have been to get rid of the Indian or half-breed title to the reservation on the west side of Lake Pepin and to bring the same into market."

The opinion of this court on this question is entitled to much greater weight than the opinion of

a Secretary rendered in 1889; because the opinion of the court was rendered only a few years after the passage of the act, and every member of the court lived within a few miles of these half-breeds, and presumably they had personal knowledge of all the facts and circumstances which induced congress to pass the Act of 1854.

This reservation was located in the richest and most populous part of the then Territory of Minnesota. It was in the direct line of western immigration which was then setting in strongly to the new northwest, and the continuance of this reservation would have operated as a barrier to this tide of immigration and would have seriously interfered with the settlement, progress and development of the new State of Minnesota about to be formed. The removal of this barrier was the main purpose that congress had in view; it was this that chiefly occupied its attention,—this was the controlling consideration.

There is absolutely nothing in the act to indicate that congress intended that the half-breed should settle upon and make a home of the lands which were to be given him in lieu of his interest in the reservation.

Congress, with rare wisdom, foresaw that this reservation was a standing menace to the future development of the growing northwest, and that it must be removed. But it could not disregard the rights of these half-breeds for they held their interest in this reservation by the solemn covenants of a treaty with the United States. Congress therefore

said to these half-breeds: "We want these lands; surrender them to the general government and we will give you an equal amount of land, acre for acre in severalty, out of any part of the public domain open to public settlement."

The act is nothing more or less, then, than a contract for the *exchange* of lands between the government and the half-breeds. In fact the transaction is described as an "exchange" of lands in the very first sentence of the act itself. It being a mere exchange of lands, acre for acre, the government was in no position, and had no moral right, to impose conditions upon the acquirement of the lands which the half-breeds were to receive in exchange for the lands they surrendered, nor did it attempt to do so. They held this reservation by a title which congress itself could not dispossess them without their consent. They were giving to the government as much as they were receiving in return. The duties and obligations between these two contracting parties were, therefore, reciprocal; and as the half-breeds conveyed their lands to the government without reservation or restriction they were entitled to receive their lands free from burdens and limitations.

The purposes of the homestead and pre-emption acts, however, are known of all men, and are plainly disclosed by the acts themselves. They were intended to encourage the settlement and cultivation of the country's vast but vacant public domain and to secure bona fide settlers upon the public lands.

Congress well knew that this would result in great benefit not only to the citizens of the country but to the country itself.

Probably the controlling consideration, both in the passage and administration of these laws, was the keen appreciation and recognition of that fundamental principle of Anglo-Saxon civilization, that a nation of home-owners, rather than landless tenants, is the surest guaranty of a country's permanence and prosperity. These laws, therefore, wisely provided comparatively long periods of residence as a condition precedent to the right to obtain these gifts of land from the government. In addition to residence, they also required improvements and cultivation; and, in order to insure compliance with these conditions, it was provided that these settlers should not convey, or make any agreement to convey, their lands until the land officials were satisfied that the law had in all these respects been fully complied with.

None of these reasons exist in the case of these half-breeds, and none of these conditions are to be found in the Act of 1854.

There is not a word in the act from beginning to end requiring the half-breed to occupy, cultivate or improve where his scrip was located on surveyed land; and the only reason for requiring improvements on unsurveyed land was to give notice of prior claims to intending settlers, and not as a condition precedent, in the sense of a personal act of service, that must be performed by the half-breed before he was entitled to receive the land.

Again, the Act of 1854, differs from the homestead and pre-emption laws in this respect: The right to take land under these laws was in the nature of a gratuity, and, aside from the purpose which congress had in view of securing permanent settlers upon these lands and their improvement and cultivation, congress had a perfect right to impose whatever conditions it saw fit upon the gift which it bestowed.

In dealing with these half-breeds the government was not bestowing a gift, but effecting an exchange of lands, and, as a matter of fact, the government received as much as it gave.

Furthermore, there is absolutely nothing in the act to indicate that congress intended that the half-breeds should take and retain these lands as homes. Although they were "mixed bloods," as described in the act, and not Indians, and although as a whole they were doubtless much more intelligent and civilized than Indians, still they had, to a certain extent, the nomadic instincts and roving disposition of their race; and, in the absence of language expressing such intent, it is hardly to be presumed that congress intended that these half-breeds should settle on individual tracts of land as white men would. This position is further borne out by the fact that at the time the act was passed these half-breeds had not severed their tribal relations with the Sioux nation of Indians, and did not do so until 1887, as we are informed by the Supreme Court of the United States in the case of Felix vs Patrick, 145 U. S., 319.

Another thing that strongly leads to the conclusion that congress never expected the half-breed to take these lands for his own personal use, is the fact that the act itself provides that the scrip might be located anywhere on the public domain, from Maine to California and from Florida to Minnesota. As congress deliberately incorporated this provision in the act permitting the scrip to be located anywhere in the United States, it is only reasonable to suppose that it expected this privilege would be exercised to a greater or less extent; otherwise the privilege was useless. If the government had intended or expected that the location of this scrip would be confined to Minnesota, or to Minnesota and the bordering states, the act would have so provided.

In fact, the government entered into an agreement with the Chippewa Indians, in September, 1854, only three months after the Sioux half-breed act was passed, and one of the provisions of this agreement permitted the Chippewa half-breeds to take the title to eighty acres of land in severalty; but it was specially agreed that the right to take the eighty acres should be within certain well defined limits. See 10 St. at Large, 1109.

No such limitation having been placed on the right to locate the Sioux half-breed scrip, it is only reasonable to infer that congress contemplated that it probably would be used in all parts of the country. But, as we have before pointed out, it is hardly to be presumed that congress thought that these half-breeds, who had not at that time severed their

tribal relations, and did not do so until more than thirty years later, would scatter all over the United States and take lands under this scrip.

If congress did contemplate that this scrip would be used in all parts of the country, and at the same time did not contemplate that the half-breed would so use it, the only logical conclusion is that it expected that the scrip would and would be used by third persons, for the acquirement of lands, or that the half-breed would use his scrip by the aid of other persons in the location and disposition of his land.

Two things are perfectly apparent from a careful examination of the Act of 1854:

1. That the act did not contemplate settlement on the land, by the half-breed, whether surveyed or unsurveyed.

2. That the law did not require any act of personal service upon the part of the half-breed, as a condition precedent to his right to earn the land.

In the light of these propositions let us examine some of the objections of the Secretary.

One of them is that the scripee "never had direct contact with the land." What provision is there in the law requiring the scripee to have direct contact with the land? The law does not require residence, either upon surveyed or unsurveyed land. Why, therefore, should the scripee come in contact with the land? What purpose would be subserved by it? Would it benefit the government in any way to have the scripee go upon the land, look at it and

then leave it the next instant? And if the scripee saw fit to go to the land office in person, or send an agent, and to locate his scrip on land without a personal examination, what provision of the law would it violate? In such event the government would receive the scrip for cancellation and would have discharged its obligation. Why, therefore, should the land officers complain?

If this had been the case of a homesteader or pre-emptor, there would be some virtue in the objection that there "had been no personal contact with the land," for those acts specifically provided that the applicant should take up his residence on the land and improve and cultivate it; and personal contact with the land is necessary in order to carry out these declared purposes of the law. But such reasons are utterly lacking in the case of the Act of 1854.

Another objection of the Secretary is "that the improvements were not placed upon the land under the personal supervision of the scripee."

But improvements were not required as a personal act of service, but in order to give notice to intending settlers, and the improvements would serve the purpose of giving notice, no matter who placed them on the land.

Another objection of the Secretary is that the improvements were not made for the personal use of the scripee and that the land was not taken for her personal use.

What personal use did the law require the scripee to make of either the improvements or the

land? It did not require her to live in the house that was constructed. In fact the Secretary himself admits this for in the case of Allen vs. Merrill, 8 L. D., on page 219, speaking of the improvements, he says: "It is not said that he must have a dwelling there."

What, then, does the Secretary mean by his persistent reference to improvements for the scripee's personal use, if no use whatever was required to be made of them?

Again, what use did the law require the scripee to make of the land? Did it require him to reside on it, even for an hour? Did it require him to cultivate even so much as a foot of it? If not, what significance is there in the Secretary's objection that the land was not taken for the scripee's personal use?

Here again we say, that if this had been the case of a homesteader or pre-emptor, there would be some force in the Secretary's objection that the land was not taken for the personal use of the applicant; for the fundamental purpose of both of these acts was to secure permanent and bona fide settlers upon the public domain; and in order to carry out this design it was absolutely essential to require residence, improvements and cultivation, in other words, *a personal use of the land.*

The administration of the public land laws, so as to effectually carry out the purpose of the government, has been a most difficult problem, and the Department has had to contend against many

fraudulent practices, evasions and violations of the law.

In order to obviate and circumvent these evasions and violations of the law, the utmost vigilance, scrutiny and supervision have been required; and, as a result, there has grown up in the Department a rigid set of rules, a system of espionage and a spirit of suspicion, unknown to any other branch of our government.

The assumption by the Secretary that the purpose of the Act of 1854 was similar to that of the homestead and pre-emption acts, and that congress intended, as he puts it, "to express the same general idea," has led him into the error of applying to the Act of 1854 the same rigid rules of construction that have been developed in the land department in the course of its administration of the laws relating to the settlement of the public lands. Therefore, we find, running all through his decisions in these scrip cases, the same expressions we would expect to meet with in cases brought against a homesteader or pre-emptor.

In fact, so completely has the Secretary surrendered himself to this misconception of the nature and purpose of the Act of 1854, that he has brought with him to the consideration of this case, not only those stringent rules of construction, but also that spirit of prejudice and suspicion peculiar to the Department, and to which we have heretofore referred.

We do not mean to impute any evil intention to the Secretary, but the fact remains, nevertheless,

that his opinion contains many positive misstatements of fact as to the condition of the record.

In his opinion, speaking of the manner in which Stram had disposed of her scrip, he says: "The scripee disposed of her scrip, surrendering possession thereof to some one now *unknown*," and "the scrip, after many years, and after passing through several hands, lodged in the hands of Frank W. Eaton"; and a little further on says: "She had, as a matter of fact, sold the scrip long prior to the location," although, not only was there no evidence that the scrip had been "disposed of years before," or that it had "passed through several hands," but the Secretary himself, in a former part of his opinion, states that Stram and her husband executed the powers of attorney attached to the scrip on May 25, 1883, only three weeks before Eaton located it, Record, p. 65, Fol. 193, and both the Register and Receiver found that "she parted with the scrip and signed powers of attorney, *shortly* before the location." Record, p. 66, Fol. 197.

Further on in the opinion the Secretary says: "He (Eaton) employed others to make slight improvements on the lands in question which were scarcely deserving of the name," although the Record, p. 117, Fol. 350, shows that there was a "house 14x16 feet, with a floor and roof, door and window, bunk and table," and one-half acre of land cleared. Such improvements would have been ample even in the case of a pre-emption filing, where residence is required, especially as this land was, at that time, 125 miles from a railroad.

Again, he says: "It was a matter of no mo-

ment to her where the scrip was located, or *whether it was located at all or not.* Her actual interest in the matter ceased when she disposed of the scrip;" although the undisputed evidence shows that a part of the consideration was not to be paid to Stram, until "After the location and adjustment of the scrip" and the execution by her of a deed to Eaton, and that this was a part of the original agreement. Record, p. 113, Fol. 340. We do not mention these facts merely to controvert these mis-statements of the Secretary, for, under defendants' theory of this case, even if the scrip had been disposed of "many years before," and even if there had been no improvements whatever placed on the land, the Secretary would not have been justified in cancelling the scrip locations.

But we have mentioned these facts rather for the purpose of showing the attitude of mind in which the Secretary approached the consideration of this case; that he proceeded to consider it in the same spirit of suspicion that would have animated him in a pre-emption contest where the applicant had been charged with an attempt to commit a fraud upon the government, an act which would have been *malum in se,* whereas, in the case of the scrip location, conceding that the act was invalid, it was merely *malum prohibitum;* that he started out with the preconceived notion that the entire body of laws relating to the public lands, and all the rules of construction peculiar to the Department, were applicable in a case of this kind. The Secretary seems to have jumped to the conclusion that,

from the *bare fact* that congress had assigned the administration of this law to the same department whose duty it was to administer the public land laws, it necessarily followed that the Department had the same duties to perform in the one case as in the others, and that in the performance of that duty the Department was governed by the same rules of construction. He does not seem to have stopped to consider that, as the fundamental purposes of these laws are different, the rules of construction should, therefore, be different.

Now, what duty did the Department have to perform in administering the Act of 1854? Simply the ministerial or clerical duty of seeing that the titles to the lands which the half-breeds might select were issued to the half-breeds and to no one else.

The contract provision in the Act of 1854 is as follows: That upon the execution of a "complete relinquishment" of their title in the reservation by the half-breeds, the government would cause to be issued to each half-breed "certificates or scrip for the same amount of land" they had relinquished.

What was the condition to be performed by the half-breed before he was entitled to receive his land from the government? Simply to convey his interest in the reservation. But this he had already done before the scrip was ever issued. Therefore, when this law was turned over to the Department to administer, the half-breed had already performed his half of the contract, and all that remained was for the Department to see that the *evidences of title for*

an equal amount of land were issued to the half-breed.

There was no supervisory power vested in the land officers to see that he should take any specific piece of land; that he should not sell it; that he should settle upon, cultivate or improve it; and the only thing in the law that could possibly be construed as committing any judicial discretion to these officers was to see that the scrip was genuine, that it was offered by the scripee or some one authorized by the scripee to locate it, and that sufficient improvements were placed on the land to warn intending settlers, if the half-breed should exercise the privilege of locating his scrip on unsurveyed land.

Up to this point in the argument our only purpose has been to call attention to the nature and design of the Act of 1854; to show that the Secretary entirely misconceived its purpose, and to reproduce, in so far as we could, the atmosphere in which this case was tried and determined by the Department. We come now to a more critical examination of the Secretary's objections to the manner of the scrip locations, and to a more careful presentation of the special defenses of these defendants.

IMPROVEMENTS.

The first objection raised by the Secretary to the manner in which the locations were made, is, that the improvements were not made "by or under

the personal supervision of the scripee," and that they were not made for her "personal use and benefit," and that the scripee had not had any direct connection with the land, and was not claiming it "for her own personal use." It is not claimed by the Secretary that these requirements are made by the language of the statute itself, and it becomes necessary, therefore, to inquire what the purpose of the law requiring improvements was, in order to ascertain whether the construction of the Secretary is right.

It will be noticed that the statute does not require any improvements whatsoever upon surveyed land. In the case of surveyed land the scripee, or his duly authorized agent, could go to the land office, locate his scrip, receive his title and dispose of the land as he saw fit, without taking up a residence, without making improvements and without ever having seen the land or knowing where or what it was. It is evident from this that the provision as to improvements was not in the nature of a *personal act of service* which must be performed as a condition precedent in order to earn the right to the land, in the same sense that improvements were required of the homesteader and pre-emptor, for, if it had been intended to make this requirement as a condition precedent to the *right to earn the land;* the same requirement would have been made as to *surveyed* land. The purpose of the law in requiring improvements on unsurveyed land was simply to give notice to intending settlers. It is well known that the pre-emption and homestead laws do not

provide for filings upon unsurveyed lands, but they do permit prospective applicants to settle upon them and thereby gain a preferred right to file on them when surveyed. Now, if the Act of 1854 had permitted scrip to be located on unsurveyed land without improvements being made, many settlers would have been misled, and would have gone upon these lands and made improvements, only to find that the lands were already taken, under the scrip locations, when the surveys were completed and they made applications to file.

The right to file upon unsurveyed lands is one that is rarely granted. In the case of these half-breeds, it was the extension of an unusual and additional *privilege*. But, under the construction given it by the Secretary, it is converted into a burden, a restriction and a limitation. Why should the government make it more difficult to acquire unsurveyed than surveyed land? Why should the government say to these half-breeds, if you will surrender your interest in the reservation we will permit you to file upon surveyed lands and as to these no requirements are made, except the presentation of your scrip at the land office; but if you take unsurveyed lands the condition precedent is prescribed, *as a right to obtain the land,* that improvements be placed thereon, "under your personal supervision," and that they be made "for your own personal use and benefit?"

What special virtue is there in unsurveyed lands that should require some *personal* act of service in order to obtain them, while as to surveyed

lands, a formal application is all that is necessary?

We contend that the requirements in regard to unsurveyed lands were not in the nature of a burden, or condition precedent, but in the nature of an additional privilege.

Congress said to the half-breeds, if you will surrender your interest in the Lake Pepin reservation, we will permit you to take "in exchange," not only surveyed lands but will also grant to you the unusual and additional privilege of taking unsurveyed lands. But, if you exercise this privilege, you must so use it as not to injure others. Settlers are constantly going upon unsurveyed lands in anticipation of their being opened to settlement, and if you were allowed to file upon such lands without in some way indicating that prior rights had attached, these settlers would be misled and would lose their time and improvements. Consequently some improvements must be placed on unsurveyed lands to serve as notice to intending settlers.

This was the sole and only purpose of the requirement as to improvements on unsurveyed lands.

But counsel says that the purpose of congress in requiring improvements on unsurveyed lands could not have been to prevent conflicts with prospective settlers, for the reason that neither homesteaders or pre-emptors were permitted to settle on unsurveyed lands until after the passage of the Act of 1854.

Our associate, Mr. Washburn, has gone into this question so thoroughly, and has answered coun-

sel so completely, that we will not burden the court by a repetition of his argument.

A comparison of the homestead and pre-emption acts with the Act of 1854, will show the absurdity of the claim that congress intended that the improvements should be placed upon the land "by or under the personal supervision of the scripee, and that the land should be taken for his exclusive use and benefit."

Both of the former acts specifically required residence, improvements and cultivation. But no one has ever been heard to claim, nor would counsel claim, that a homesteader or pre-emptor is required by the law to build his house himself or to plow his land with his own hands.

If neither a homesteader or pre-emptor is required to make the improvements on his land in person, what provision is there in the Act of 1854, or what reasonable reason outside of the act can be given, that requires the scripee to make his improvements in person, and that they be made for his own personal use, especially as the Secretary himself admits that no use whatever is required to be made of them after they are placed upon the land.

The requirement by the Department that improvements should be made "for the personal use and benefit" of the scripee, and "that the Indian has a direct connection with the land, and is claiming the same for his personal use," was made because of the misapprehension that the purpose of the Act of 1854 was the same as that of the homestead and pre-emption acts; and we shall show that the ex-

pressions quoted above were appropriated bodily from those acts.

Sec. 2290, R. S., provides, that the homesteader shall make an affidavit:

> "That such application is made *for his exclusive use and benefit*, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly *for the use or benefit of any other person.*"

Sec. 2262, R. S., provides, that the pre-emptor shall make oath:

> "That he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it *to his exclusive use.*"

These acts themselves specifically required that the settler should take his land "for his own exclusive use and benefit." But there is no such provision in the Act of 1854, or anything that resembles it.

Now, how does it happen that congress was so careful to incorporate this provision in the homestead and pre-emption acts, and omitted it from the Act of 1854?

There is but one conclusion that can be drawn. Congress intended that homesteaders and pre-emptors should take their lands for "their own exclusive use and benefit," and, consequently, so provided in the act itself; it did not intend that these half-breeds

should take these lands for their own exclusive use and benefit, and, therefore, omitted the provision from the Act of 1854.

But the Secretary says the Land Office Circular of January 29, 1872, Copp's Land Laws, 723, provided that the improvements must be made "by or under the personal supervision or direction of the scripee," and "that they are for his personal use," and "that the Indian has a direct connection with the land, and is claiming the same for his personal use."

That is true. But if the law did not make any such requirement, the land officials could not; and the circular, being an enlargement of and addition to the law, was invalid.

In Hartman vs. Warren, 76 Fed. Rep., 162, the court says: "The land department may undoubtedly make reasonable regulations for the conduct of the business instructed to it and the discharge of the duties imposed upon it, provided, always, that they are not inconsistent with the legislation enacted and the policies adopted by congress."

We have already stated our reasons for the belief that the law required improvements on unsurveyed lands merely for the purpose of giving notice to intending settlers; but there are additional ones.

The first circular providing how this scrip might be located was issued March 21, 1857, and will be found in 1 Lester, 627.

The second circular was issued February 22, 1864, and will be found in Copp's Public L. L. 721. Neither one of these circulars contains the provis-

ion found in the Circular of 1872, nor anything that bears any resemblance to it. Consequently, it would appear, that for a period of eighteen years, the land officers placed no such construction upon the law relating to improvements as the Secretary now does.

As bearing out our contention that the provision of the law, in regard to unsurveyed land, was not in the nature of an absolute condition precedent but was for the purpose of giving *notice*, we call attention to one of the provisions of the Circular of 1857, which reads as follows:

> "Where the scrip may be located on unsurveyed lands outside of the reservation on which the half-breed has improvements, and which is not reserved by government, his application for location should be accompanied by a diagram and description, denoting natural objects and distances, so as to fix with certainty the exact locality wanted, *serve as the best notice in our power to settlers, that conflict may be avoided*, and enable you, when the public surveys are made, to designate the legal subdivisions embracing the location." (Italics our own.)

Evidently the land department, at this time, thought the purpose of improvements was simply to give notice to settlers, and to prevent conflicts.

If anything further were required to show the unreasonableness of the requirement, in regard to improvements, made by the Circular of 1872, it is

furnished by the absurd reasons assigned by the circular itself for such requirement.

The first section of that circular reads as follows:

> "It has been brought to the notice of this office that Sioux H. B. Scrip has frequently been filed in the local land office for unsurveyed lands, and that, under the shadow of *title thus acquired, the land has been denuded of the timber or otherwise depreciated*, and after the survey the parties would allow the time for adjustment to pass without action, and then *withdraw the scrip from the office, and file it for, or relocate it upon, other land.*" (Italics our own.)

The circular then goes on to say that with a view to remedy this evil the land officers shall thereafter require that the improvements be made "by or under the personal supervision of the scrip," and that the scripee shall have a direct connection with the land," and "claim it for his own personal use."

The evil complained of is the location of scrip on unsurveyed land, denuding the land of its timber, then withdrawing the scrip and filing it upon other land. The remedy proposed is that the improvements shall be placed upon the land by the scripee and that he shall have direct contact with the land.

But how does the proposed remedy obviate the evil complained of?

Suppose that after this circular was promul-

gated the land officers had required the half-breed to make his improvements in person, to file his scrip in person and to "have a direct connection with land;" and the half-breed had denuded, or had permitted others to denude, the land of its timber, and had then been permitted to *withdraw the scrip and file it upon other land;* would the evil complained of have been corrected? Certainly not. The evil complained of did not grow out of the fact that improvements were not made upon the land by the scripee in person but out of the unwarranted and unauthorized practice of the land officials themselves in permitting *scrip to be withdrawn* after it had once been located.

The statute never contemplated that the scripee should have the right to more than one location, any more than it contemplated that the homesteader or pre-emptor should have more than one entry.

If the land officials had never permitted the withdrawal of scrip, the evil complained of could never have arisen, and the only thing that was necessary for the Secretary to do to check the evil was to instruct the land officers to discontinue the practice of permitting the scrip to be withdrawn after it had once been located.

Our conclusion is, therefore, that for eighteen years immediately after the passage of the law the construction of the Department did not require improvements to be placed upon the land "by or under the personal supervision of the scripee," and "that they are for his personal use;" that this was the correct interpretation of the law; that the only

purpose of the law in requiring improvements was to give notice to third persons; that the provisions of the circular of 1872, requiring improvements to be made "by or under the personal supervision of the scripee," was an enlargement of the terms of the statute and, therefore, invalid; that the reasons assigned by the circular itself for its requirements are absurd, and that the remedy proposed is utterly in effectual to prevent the evil complained of.

No Improvements Necessary.

It has already been shown that improvements were actually made in this case. But the defendants contend that, under the facts in this case, no improvements whatsoever were necessary. We have seen that the only purpose of the improvements was to give notice to intending settlers. The record discloses that the only person who ever claimed any interest in this land, besides those claiming under the scrip, was Hyde.

But the decision of Secretary Vilas, upon which the plaintiff in this case relies, holds that Hyde never gained any right to the land, and that the fraudulent contract into which he entered would have prevented him from obtaining the land even if there had been no scrip locations thereon.

Therefore, under the facts, there was no one who would have been injured even if there had been a failure to place any improvements on the land.

To show the absurdity of requiring improvements where there are no third persons claiming under adverse rights, we need only give a very simple illustration. Suppose that a scripee goes upon unsurveyed land and, in an attempt to comply with the law as to improvements, merely chops down a tree, and, after the land had been surveyed, had gone to the land office to have the scrip adjusted to the surveyed land.

Upon the Secretary's theory as to the necessity for improvements, we can imagine the following dialogue as taking place:

Scripee: Mr. Register, sometime ago I located my scrip on the south half of section 2. I understand that the land has since been surveyed and I would like to have the scrip adjusted.

Register: Since you located your scrip we have learned that all you did in the way of improvements was to chop down a tree. Is that true?

Scripee: That is correct, Mr. Register.

Register: Then we cannot permit the adjustment of your scrip to this land, for chopping down a single tree is manifestly not a sufficient compliance with the law as to improvements.

Scripee: Has my failure to comply with the law forfeited my right to the scrip?

Register: Oh, no, it simply prevents you from obtaining an adjustment to the original location. Here is your scrip and you are at liberty to locate it

upon any of the public lands not otherwise appropriated.

Scripee: Mr. Register, is the south half of section 2 still vacant and unclaimed?

Register: Yes.

Scripee: Can I locate my scrip upon that land?

Register: Certainly. The land has been surveyed and is open to settlement; no one else is claiming it and it belongs to a class of lands subject to the location of such scrip.

Scripee: Mr. Register, might I inquire how it is that I could not acquire this land under my original location because of the insufficiency of my improvements, but do acquire the same land under the subsequent location; although in the meantime I have made no additional improvements?

Register: Why, that is perfectly plain. Your original location was on unsurveyed land. In such cases the law specifically provides that improvements shall be placed upon the land. You had failed to comply with the law in this respect; therefore, your location was invalid, and no title could pass to you through an invalid location. But your subsequent location was on surveyed land. In such cases the only requirements are that the land shall be unappropriated and of a class subject to the location of such scrip. All these conditions existed when you filed on the surveyed land, and, there-

fore, the location of the scrip was proper and regular.

And the scripee walks out of the land office, with his title to the land, marvelling more than ever, at the almost super-human wisdom that is required to administer the public land laws.

The law requires that one must be a citizen, or have declared his intention, to enable him to make a pre-emption filing. But in the case of Jacob H. Edens, 7 L. D., 229, the claimant made his settlement while he was an *alien*. Notwithstanding this fact, Secretary Vilas held that his entry should be allowed because it appeared that he had afterwards declared his intention to become a citizen *before any adverse claims had attached.*

This doctrine is also laid down in the following cases:

Kelly vs. Quast, 2 L. D., 627.
Mann vs. Huk, 3 LL. D., 452.
R. R. Co. vs. Painter, 6 L. D., 485.

Likewise, the defendants claim that as no *adverse rights* had attached in the case at bar, either at the time the scrip was located or adjusted, no one would have been injured even if there had been no improvements.

This disposes of the Secretary's first objection.

II.

Was the Provision of the Act of 1854, Prohibiting Assignments of the Scrip, Intended to Prohibit and Prevent Conveyance of the Lands to be Taken Under the Scrip, Until After the Scrip had Been Located?

The Secretary's second objection to the validity of the scrip locations, and his second ground for cancelling the locations, was the manner in which Eaton obtained the title to the land from Stram.

It will be remembered that on the 23rd day of May, 1883, Stram gave a power of attorney to Eaton to locate the scrip in her name, and at the same time gave a power of attorney to Merritt to sell the land after the scrip had been located.

Eaton caused improvements to be made upon the land, as it was at that time unsurveyed, and, on the 16th of June, 1883, located the scrip in the name of Stram.

Shortly after the location, Merritt, as attorney in fact for Stram, conveyed the title to Eaton.

The Secretary's view of this transaction is, that the purpose of the act in prohibiting assignments of the scrip was to prevent conveyances of the land or agreemnts to convey, until after the locations of the scrip; and, as this was the purpose of the act, that the execution and delivery by Stram, before the location of the scrip, of a power of attorney to convey the land was a mere device to evade the provisions of the act prohibiting conveyances of the land.

In order that we may not be reasoning from false premises in the discussion of this question, let us first ascertain definitely just what it is that the Secretary complains of. In the middle of page 217, of the case of Allen vs. Merrill, 8 L. D., after referring to the fact that the usual manner of using this scrip was by two powers of attorney, one to locate the scrip and the other to convey the land when located, and after stating that the use of the power of attorney to locate alone, is lawful, he says:

> "When the location is made, if validly made, the title vests at once in the person to whom the scrip was issued; *and thereupon a conveyance of the land is executed* by some person who consents to the use of his name as attorney, under the authority of the other letter of attorney, the blanks of which are filled accordingly.
>
> "Thus the title passes to the party owning the scrip. *And thus by circumvention, the thing is done which the statute forbids to be done.*" (Italics our own.)

What is it that the statute forbids to be done, accordng to the Secretary?

To make an agreement before the location, to convey the land after location. Again, on page 216 of this case the Secretary says:

> "While no restriction was put upon his power of alienation of the land *when it should be located,* until that time no other person should have any share or interest in this right."

The construction, therefore, which the Secretary places upon that clause of the act which says: "Thou shalt not assign or transfer scrip," is that it means "thou shalt not convey land *before location* of the scrip."

The statute itself does not prohibit the conveyance of land before location. But the Secretary says that was the purpose of the provision prohibiting assignments of the scrip, and as the arrangement between Stram and Eaton was a mere device to enable them to convey *land* it was invalid. We may admit that the transaction, so far as it affected Eaton's right to obtain the land, was invalid if the *purpose* of the prohibitory clause of the act was to prevent the conveyance of land before location of the scrip.

Having laid down the premise that the purpose of the act in prohibiting assignments of the scrip was to prevent conveyances of the land before the location of the scrip, the Secretary then enters upon an elaborate argument to prove that the use of the two powers of attorney, one to locate the scrip and the other to convey the land after location, was a mere device to evade the provisions of the law prohibiting conveyances of the land.

We shall not stultify ourselves by attempting to prove that two persons could, by such a palpable device, evade the provisions of the law, if the purpose of the law was, as the Secretary asserts, to prevent the conveyance of the land. We admit the

conclusions of the Secretary, it is his premises that we deny.

Both the Secretary and counsel admit that the scripee has a perfect right to convey his land the instant after the location of the scrip.

In other words, both the Secretary and counsel admit that if Stram had located her scrip, either in person or by a power of attorney to Eaton or any one else, and the moment *after* the location had conveyed the land to Eaton, that the transaction would have been valid and that the title would have vested in Eaton.

The reason, and the only reason, that is assigned for the construction of the law that the scripee is prohibited from conveying his land before the location, and is permitted to convey it the instant after location, is that these Sioux half-breeds were incompetent and congress for this reason prohibited them from conveying their land until after the location of their scrip.

According to the Secretary and counsel, if a half-breed should present himself at the window of the land office at Duluth, tomorrow morning at 9 o'clock, with unlocated scrip in his hand, he would, in the eyes of the law, be an incompetent and utterly incapable of taking care of his own affairs. At nine o'clock and five minutes, having located his scrip, he steps forth clothed with all the rights and powers of any citizen as to the control and disposition of property. According to the Secretary and counsel, if a white man had entered into a contract with this half-breed for a conveyance of the land he was en-

titled to, at eight o'clock and fifty-nine minutes, the contract is void. If entered into at nine o'clock and five minutes it would be as valiid and effectual as any contract between individuals.

Before the plaintiff can prevail in this action it must answer two questions:

1st. If congress regarded the half-breed as incompetent and incapable of disposing of his land *immediately before location of the scrip,* why did it permit him to sell his land *immediately after the location?* If he was an incompetent and in need of protection before the location of his scrip, why was he not an incompetent and just as much in need of protection immediately after the location?

2nd. If the purpose of congress was to prevent the conveyance of *land,* why did it prohibit the assignment of *scrip?* Why did congress not say: "Provided, however, that all conveyances of the *land,* prior to the location of the scrip, shall be null and void."

The defendants, on the other hand, contend that neither upon reason nor, under the rules of statutory construction, can the language of the act, prohibiting assignments of the scrip, be interpreted as prohibiting conveyances of the land, prior to the location of the scrip.

They contend that there are only two classes of cases in which congress has ever prohibited the conveyance of land granted by the government:

1. Where the beneficiary is an incompetent.

2. Where the law requires some personal act of service from the beneficiary as a condition precedent to his right to obtain the land, and the restriction upon the right to alienate is made to secure the performance of said act.

The argument that the Act of 1854 prohibited the scripee from agreeing to convey his land because he was an incompetent is untenable, for the reason that if this had been the purpose of the act the scripee would have been prohibited from conveying the land *after*, as well as *before* the location; for if he was an incompetent, he was as much in need of protection after he received his land as before.

We contend that the Act of 1854 does not come within the second class of cases, noted above, for the reason that the statute does not require any personal act of service from the scripee as a condition precedent to his right to obtain the land.

Homesteaders and pre-emptors were required to reside upon and cultivate their lands, and, in order to secure a compliance with these requirements they were prohibited from conveying their lands until they had complied with these provisions of the law.

But the scripees, under the Act of 1854, were not required either to cultivate or reside upon the land; consequently, no necessity existed for a prohibition against the conveyance of the land as in the case of homesteaders and pre-emptors.

Not only were there no reasons for placing any

restrictions upon the right of the scripee to alienate his land, but the defendants contend that the language of the act prohibiting assignments of the scrip will not, under the ordinary rules of statutory construction, bear out the interpretation that conveyance of the land was intended to be prohibited.

The law prohibited assignments of the scrip, but it did not prohibit conveyances of the land.

These pieces of scrip were simply the written certificates of the government that the several half-breeds were entitled to a certain number of acres of land. It was the assignment of these written instruments that was prohibited, not the transfer of the land to be obtained under them.

If A should enter into a written agreement with B to convey a piece of land to him, "but not to your assigns," B could not assign this agreement to C so as to enable C to compel A to convey the title to him. But if B should, pending the agreement convey the *land* to C, A could not, for that reason, refuse to convey the title to B.

The defendants contend that if congress had intended to prohibit the conveyance of the land, it would have said so instead of prohibiting the assignment of scrip. It would have struck directly at the *thing* to be prohibited, instead of prohibiting one thing and leaving it to argument, inference and implication that something else was intended to be prohibited.

They claim that there is a distinction between a prohibition against the assignment of a *right* to land and a prohibition against the transfer of the

land itself, and that the courts have clearly recognized the distinction.

They contend that restrictions upon the right of alienation are not favored in law, and that the courts will never assume that the legislature has intended to prohibit the alienation of land, unless it be by the use of language so clear and explicit that no other interpretation could be placed upon it.

Finally, they say that the purpose of the prohibition against the assignment of the scrip was to compel the issuance of the evidences of title direct to the scripee, in order to prevent the government from becoming involved in disputes over the title to the scrip and land that would have been certain to arise if assignments of the *scrip itself* had been permitted; and they also contend that the prohibition against the assignment of the scrip operated to prevent the possibility of frauds being committed against the government through the location of forged assignments; for, under the law as it stands, the government does not recognize assignments of the scrip, whether forged or genuine, but always locates the scrip in the *name* of the scripee and issues the title direct to him, and hence cannot, under any circumstances, be called upon to redeem the scrip a second time.

The above is a brief statement of the views of the plaintiff and defendants on the prohibitory clause of the Act of 1854.

We propose now to examine this question more at length, and from two standpoints:

1. Were there any good reasons why congress should have placed any restrictions upon the right of these half-breeds to convey the lands they were to receive from the government?

2. If there were such reasons, will the rules of statutory construction permit a court to declare that the language of the act, prohibiting assignments of the scrip, is to be interpreted as prohibiting conveyances of the land, prior to the location of the scrip.

We are first lead to examine, then, the reasons assigned by our opponents for the alleged restriction upon the right of the scripees to convey their lands.

The only reason that the Secretary furnishes for the enactment of the clause of the act prohibiting assignments of the scrip is, that it was intended to prevent conveyances of the land before the location of the scrip. But that is hardly a satisfactory answer for the query still arises, why did congress intend to prevent conveyances of the land, prior to the location of the scrip?

Counsel for plaintiff seems to have recognized this for he goes one step further and says that the half-breed was prohibited from conveying his land, prior to the location of the scrip, for the reason that he was an incompetent and congress regarded him as incapable of taking care of his affairs and disposing of his property.

But counsel has himself destroyed all the argu-

ments he has advanced for the theory of incompetency. He first claims that the purpose of the prohibitory clause of the act, was to protect the half-breed; that congress regarded the half-breed as incapable of taking care of his own property and placed a restriction upon his right to alienate his land to prevent the shrewder white man from getting it away from him.

He then admits that the moment the half-breed locates his scrip he is as free to dispose of his land as anyone. What, then, becomes of the theory of incompetency? If the half-breed was utterly incapable of taking care of his property the moment *before* he located his scrip, by what mysterious mental process was he converted into a competent, by the mere investiture of title, and rendered capable of disposing of his land the moment *after* he located his scrip? If he was in need of the protecting care of the government the instant before he acquired his land, why was he not just as much in need of that protection the instant after he acquired his land? According to counsel, the government regarded the half-breed as in need of guardianship and protection, and attempted to provide him with safeguards, and then abandoned him when he was most in need of protection, and left him to take care of himself. Under the law, a minor cannot dispose of his lands, except through his guardian. But the moment he attains his majority he is invested with that right himself. But this is because he is regarded as having arrived at the age of discretion, in the eyes of the law, when he has attained his majority.

The time is definitely fixed by law, and the change from incapacity to competency is based on common sense and reason. But how could the mere location of a piece of scrip alter or change the mental capacity of the scripee?

Under counsel's theory, two half-breeds, who today have unlocated scrip in their possession, are both incapable of disposing of the property they are entitled to receive under the scrip. Tomorrow, one of them locates his scrip and is instantly converted into a competent; the other remains an incompetent. Yea, this logic leads to still greater lengths of absurdity, for, as we have seen, each half-breed received five different pieces of scrip; therefore, if a half-breed had located one piece of scrip he would, at he same moment of time, be competent to dispose of the land located and incompetent to dispose of the land to be received under the four pieces not located.

Not only is counsel's theory of incompetency untenable, but he has himself furnished us with a witness to disprove it.

In his brief in the court below, counsel quoted quite freely from the report made by George W. Manypenny, Commissioner of Indian Affairs, to congress, relative to the condition of these half-breeds at the time the Act of 1854, was under consideration. We quote from said report as it appears on page 19 of counsel's brief in the court below.

> "The Indian titles to the whole of the country surrounding said reservation are now

extinguished, and the bands to which said surrounding country belonged have removed westward, and many of the less cultivated of said half-breeds are desirous of disposing of their interests in said reserve and following their Indian relatives. Some have gone already. Many of them, however, are represented as being educated, and having judgment and experience sufficient to take care of their own interests. A number of them are said to be men of much intelligence, possessing property and having become citizens of Minnesota and the adjoining states. Some of them have served in the legislature and filled offices of honor and trust in the Territory, while others are engaged in agriculture, mercantile and other profitable pursuits. With them, at least the object of the fostering policy of the government has been attained, in fitting them for civilized life for, in point of intelligence and civilzation, many of them would compare favorably with their white brethren."

A little further on he says:

"I am informed that many of the half-breeds are very competent to manage their own affairs and that they have good improvements on their reserve. It is said that others are altogether incompetent to take care of property. Some of the thrifty half-breeds, it is said, have gone off the reserve and bought land and made improvements, being unwilling to do so on the reserve because they could not have land assigned to them in severalty. No good can result to the half-breeds by the continuance of this occupancy in common. Some legislation will, in my opinion, be necessary before a change can well be made, if for no other purpose than to protect the interests *of such por-*

tion of these people as are incompetent to manage their own affairs." (Italics our own.)

Counsel brings forward this witness and asks us to accept his report as evidence of the fact that these half-breeds were incompetent, and that congress, because of this incompetency, prohibited them from conveying their lands prior to the location of the scrip.

Conceding, for the present, that the report of the Commissioner of Indian Affairs can be received as evidence of the purpose congress had in mind, the report itself disproves the very thing which is sought to be sustained by it.

For, according to the Commissioner, many of these half-breeds were educated and intelligent and perfectly capable of managing their own affairs; but no discrimination is made in the act itself, and the prohibitory clause of the act is applicable to all the half-breeds alike.

Now, if the purpose congress had in view, in incorporating the prohibitory clause of the act, was to protect incompetents, how does it happen that the same restrictions were made applicable to the educated and intelligent to those who had become "Citizens of Minnesota and adjoining states"; to those who were engaged in "mercantile and other profitable pursuits," to those who had held "offices of honor and trust", and to those "who would compare favorably with their white brethren?"

If many of these people were concededly capable of taking care of their own affairs, is it conceivable that congress would use so little discrimina-

tion as to subject them to restrictions for which there was admittedly no reason?

If congress had had this question of competency in mind and had deemed part of them capable and part of them not, would it not rather have been provided, as has been done in scores of cases, that those who were competent should take their lands free from restrictions, and that those who were not should never convey their lands, or that the restrictions should be removed whenever the President, the Secretary, or some other person or tribunal, appointed by law, should determine that the restrictions should be removed, instead of making the restriction apply to all, whether there was reason for it or not?

Again, the report and the act considered together show that congress did not follow the advice of the Commissioner, for the latter only recommended legislation to protect the interests of "*such portion* of these people as are incompetent to manage their own affairs."

But, as we have seen, the prohibitory clause of the act applies to all. It is manifest, therefore, that congress disregarded the advice of the Commissioner.

Counsel admits that part of these half-breeds were competent and part of them were incompetent, and that the prohibitory clause of the act applies alike to both competents and incompetents.

Counsel also admis that the restriction upon the right to alienate the land was only *temporary*, and he must also admit that no person or tribunal

was appointed by law to determine when the restriction should be removed.

~~Counsel also admits that the restriction upon this act by counsel is untenable, for the reason that~~ A careful study of the treaties negotiated by the government with the various tribes of Indians will show that the uniform policy pursued by the government, in negotiating treaties, is not in harmony with the construction contended for by counsel.

A careful examination of these treaties will show:

1. That wherever the government has negotiated treaties with Indians, part of whom were competent and part incompetent, that restrictions have only been placed upon the incompetent and that those who were competent have been left free to dispose of their lands at will.

2. An examination of these treaties will show that wherever restrictions to alienate the land have only been made, *temporarily*, that the law has always provided, definitely and in terms, for some person or tribunal to determine when the disability has ceased and when the restrictions should be removed.

Under the first class, we call attention to the following treaties. Art. 4, of the treaty with the Wyandotts, 10 St. at Large, 1161, provides:

> "To those reported by the commissioners to be competent to be entrusted with the control and management of their affairs and in-

terests, the patents shall contain *an absolute unconditional grant in fee simple; but to those not so competent,* the patents shall contain an express condition, that the lands *are not to be sold or alienated for a period of five years,* and not then without the express consent of the President of the United States first being obtained." (Italics our own.)

Art. 8, of the treaty with the Shawnees, 10 St. at Large, 1057, provides:

> "Such of the Shawnees *as are competent* to manage their affairs shall receive their portions of the aforementioned annual installments in money. But the portions of such as *shall be found incompetent* to manage their affairs, whether from drunkenness, depravity, or other cause, shall be disposed of by the President, in that manner deemed by him best calculated to promote their interests and the comfort of their families."

Art. 4 of the treaty with the Chickasaws, 7 St. at Large, 451, provides:

> "The Chickasaws desire to have within their own direction and control, the means of taking care of themselves. Many of their people are quite competent to manage their affairs, though some are not capable, and might be imposed upon by designing persons; it is therefore agreed that the reservations hereinafter admitted, shall not be permitted to be sold, leased or disposed of unless it appears by the certificate of two of the following named persons, that the party owning or claiming

the same, is capable to manage and to take care of his or her affairs."

It will be noted in the treaties cited above, and many others might be quoted to the same effect, that the government has made a clear distinction in dealing with Indians between the competent and the incompetent.

We now call attention to a class of treaties where temporary restrictions have been imposed, and which clearly provide the conditions upon which the restrictions may be removed, and name the person or tribunal who shall determine that fact.

Art. 4 of the treaty with the Potawatamies, 7 St. at Large, 185, provides:

> "The United States agree to grant to the persons named in the annexed schedule, and their heirs, the quantity of land therein stipulated to be granted; but the land so granted shall never be conveyed by either of the said persons, or their heirs, unless by the consent of the President of the United States."

Art. 6 of the treaty of the Miamies, 7 St. at Large, 191, provides:

> "The several tracts of land which, by the third article of this treaty, the United States have engaged to grant to the persons therein mentioned, except the tracts to Jean Bapt. Richardville, shall never be transferred by the said

persons or their heirs, without the approbation of the President of the United States."

Art. 2 of the treaty with the Chippewas, 10 St at Large, 1167, provides:

> "Said tracts shall be exempt from taxation, levy, sale or forfeiture, and shall not be aliened or leased for a longer period than two years, at one time, until otherwise provided by the legislature of the state in which they may be situated, with the assent of congress."

Art. 6 of the treaty with the Ottoes, 10 St. at Large, 1039, provides:

> "And the president may, at any time in his discretion, after such persons or family has made a location on the land assigned for a permanent home, issue a patent to such person or family, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture which conditions shall continue in force, until a state constitution embracing such land within its boundaries shall have been formed, and the legislature of the state shall remove the restriction."

A third class of treaties provides that the lands shall never be sold to third parties.

Art. 12 of the treaty with the Senecas, 7 St. at Large, 350, provides:

> "The lands granted by this agreement and

convention to the Seneca tribe of Indians, shall not be sold or ceded by them, except to the United States."

Art. 9 of the treaty with the Ottawas, 7 St. at Large, 361, provides:

"The lands granted by this agreement and convention to the said band of Ottawas, residing at Blanchards Fork, and Oquanoxas Village, shall not be sold or ceded by them, except to the United States."

The above selections show that whenever the government has attempted to surround the Indian with safeguards, there has been no uncertainty, either as to the language used to express the intent, or as to the methods and machinery adopted to carry out the declared purpose of the law. They show also that judgment and discretion have been exercised, and that where reasons have existed for the imposition of restrictions, they have been made, and where reasons for restrictions are lacking, they have not been made.

In the cases cited above, where it was intended to perpetually prevent the Indian from conveying his land, the language used is so clear and explicit that there can be no possible doubt as to its meaning. Where the prohibition against conveyance is only temporary, the treaties invariably provide the conditions upon which the restrictions are to be removed, and name the person or tribunal who is to determine the fact; and where the government has

dealt with Indians, part of whom were competent and part incompetent, it has placed restrictions upon the incompetent and left the competent free from limitations.

In view of the extreme care which the government has always exercised to define its purpose when dealing with incompetent Indians, and of the clear and explicit language which it has always used to indicate its purpose, it seems to us but little short of the absurd to claim that the purpose of congress, in prohibiting the scripees from assigning their scrip, was to protect the incompetent, when it is admitted that the prohibition applied to the competent as well, and no less absurd to claim that, although congress intended to prohibit conveyances of the *land*, it failed to use the language which would have most clearly and certainly expressed its meaning, but left the question open to argument, inference and implication by only prohibiting assignments of the scrip.

Legislative bodies are supposed to be careful in all their actions, but when they deliberately set out to protect the interests of minors, idiots, insane, or any other class of incompetents, we have a right to assume that unusual caution will be exercised in giving expression to the legislative intent, and that as little as possible will be left for construction.

The proposition that congress regarded the Sioux half-breeds as incapable of taking care of their affairs before the location of their scrip, and as perfectly competent immediately after the location, although in the meantime there had been no

actual change in their condition, and no person or tribunal provided to determine the question of competency, seems to us to be without any support in reason whatever.

Another thing that makes against counsel's theory of incompetency is the provisions of the act itself.

It will be remembered that the act permits these half-breeds to take lands *out of any part of the public domain,* and that they are to hold these lands by *a fee simple title and in severalty.*

The very fact that the act permitted these half-breeds to separate and take lands in different localities, throughout the entire country, and to hold these lands by a fee simple title in severalty, is proof conclusive that congress did not intend to treat them as incompetent.

If the government had regarded these half-breeds as incompetent Indians, it would either have left them on the reservation where they had their homes and improvements, or, if the government desired to obtain their reservation in order to throw it open to settlement, and had considered them as incompetent, it would have set apart a reservation for them in some more remote and less settled part of the country, where they could indulge in the sports and manner of life common to uncivilized Indians, and where they would not interfere with, or be interefered with, by white men. This has been the custom from the earliest history of the country. As settlement and civilization has advanced towards the West and encroached upon the Indian

reservations, the government has negotiated treaties with them for their lands, and set apart reservations for their use in some more remote part of the country.

That congress did not pursue this course with the Sioux half-breeds is strong proof of the fact, that congress did not regard it as necessary to longer colonize them on a reservation, and did not consider and treat them as incompetent Indians.

There is another thing that argues against counsel's theory, and that is, that there is nothing in the language of the act itself to indicate incompetency; and, as we have seen in the numerous treaties heretofore referred to, and in hundreds of others that might be cited, wherever negotiations have been had with incompetent Indians, the language used for their protection has been certain, full and explicit.

As the idea of incompetency has not been expressed in the act itself, counsel asks the court to *assume* that congress regarded and treated these half-breeds as incompetents, from the bare fact that the act applies to Indians.

In order to lay a foundation for this assumption, counsel has cited many cases and has expended much argument to show that the policy has always been to treat Indians as wards of the government.

We deny that this has been the uniform policy of the government, and further on shall cite the court to many instances where the unrestricted

right to take and convey lands has been given to *full-blooded* Indians.

But even if it were admitted that the uniform policy of the government towards full-blooded Indians was to treat them as wards, the admission would have no effect in the case at bar.

Counsel insists on treating these people as *Indians*. But they are not Indians. The very first sentence of the act itself describes them as "half-breeds or mixed bloods." Therefore, it is to be presumed that *all* of them were at least half white, and as the act is also careful to use the word, "mixed bloods," that many of them had a much greater proportion of white blood in their veins.

Is a court to *assume*, in default of language clearly expressing such intent, that the legislature regarded a class of persons, all of whom were half white, and many possessing a much larger proportion of white blood; many of whom, according to the witness counsel has produced, were "citizens of Minnesota and adjoining states," and "had held positions of honor and trust," and "were engaged in agriculture, mercantile and other profitable pursuits" and "many of whom would compare favorably with their white brethren," is a court to *assume* that congress intended to class these people with full-blooded Indians and to treat them as wards of the government?

But it has already been decided that the Act of 1854 does not treat these half-breeds as wards of the government, and that the courts cannot *assume* that they are incompetent.

The Act of 1854 was under consideration in the case of Felix vs. Patrick, 36 Fed., 457, and the same contention was made in that case, as in the case at bar, that the half-breeds were incompetent and wards of the government.

Justice Brewer delivered the opinion, and on page 461 he says:

> "But it is erroneously contended that a different rule should be applied in this case because the plaintiff and his ancestors were Indians; that the law is very tender in respect to the rights of such persons who are not familiar with our laws and methods of transacting governmental or private business, and were ignorant of the disposition which had been made of the scrip. And it is also argued that as Indians they were the wards of the government and could not have asserted their rights to the property, even if they had known what their rights were. *It is not shown that they were not persons of education and intelligence,* or that they were not in fact familiar with the land laws and the methods of governmental business, *or that they were not in fact as competent to look after their rights as any person.* We all know that many of these Indians, *especially the half-breeds,* are well educated, intelligent, and as fully competent to look after their business as any person; and the fact that they were Indians and maintaining tribal relations, and were in a certain sense the wards of the government, did not debar them from a hearing in the courts of Nebraska."

Justice Brewer says:

> "It is not *shown* that they were not persons of education and intelligence, or that they

were not in fact as competent to look after their rights as any person."

It is evident from this language that Justice Brewer could not find anything in the act itself which conveyed the idea of incompetency, and that he also thought the court had no right to *assume* it; for, if it could be assumed, it would not have to be "shown."

The very fact that it appears by the Ninth Art. of the treaty of Prairie du Chien, 7 St. at Large, 330, that the chiefs of the Sioux nation requested that the Lake Pepin Reservation be set aside for the half-breeds so that they might live apart from the full bloods, and that the request was granted, shows that both the full bloods and the government recognized the fact that there was a difference between the full bloods and half-breeds.

Furthermore, the government has, in its treaties with Indians, clearly recognized the fact that there is a vast difference in point of intelligence between half-breeds and Indians.

In confirmation of this we call attention to the following treaties:

The seventh paragraph of Art. 2 of the treaty with the Chippewas, 10 St. at Large, 1110, provides:

> "Each head of a family or single person over twenty-one years of age at the present time of the *mixed bloods*, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which

shall be secured to them *by patent in the usual form.*" (Italics our own.)

In Art. 3 of the same treaty, the provision in regard to the *full bloods* is as follows:

> "The President may, from time to time, at his discretion, as fast as the occupants become capable of transacting their own affairs, assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, *with such restrictions of the power of alienation as he may see fit to impose.*" (Italics our own.)

Art. 6 of another treaty with the Chippewas, 10 St. at Large, 1169, provides:

> "And such of the mixed bloods as are heads of families, and now have actual residences and improvements in the ceded country, shall have granted to them, *in fee*, eighty acres of land, to include their respective improvements." (Italics our own.)

In Art. 2 of the same treaty, the provision, in regard to the *full bloods* is as follows:

> "The president may, at his discretion, as the occupants thereof become capable of managing their business and affairs, issue patents to them for the tracts so assigned to them; said tracts to be exempt from taxation, levy, sale or

forfeiture, *and not to be aliened or leased* for a longer period than two years, until otherwise provided by the legislature of the state in which they may be situated, with the assent of congress." (Italics our own.)

Art. 7 of the treaty with the Winnebagoes, 10 St. at Large, 1174, provides:

"And such of the *mixed bloods,* as are heads of families, and now have actual residences and improvements of their own, in the ceded country, shall each have granted them, *in fee,* eighty acres of land, to include their improvements." (Italics our own.)

In Art. 4 of the same treaty, the provision as to the *full bloods* is as follows:

"The President shall, from time to time, as the Indians may desire it, assign to each head of a family, or single persons over twenty-one years of age, a reasonable quantity of land, in one body, not to exceed eighty acres in any case, for their separate use; and he may, at his discretion, as the occupants thereof become capable of managing their business and affairs, issue patents to them for the tracts so assigned; said tracts to be exempt from taxation, levy, sale, or forfeiture, until otherwise provided by the legislature of the state in which they may be situated, with the assent of congress; *nor shall they be sold or alienated* within fifteen years after the date of the patents, and not then, without the assent of the President of the United States, being first obtained." (Italics our own.)

Scores of other treaties to the same effect might be cited, but the above illustrate the principle as well as a hundred.

Thus we see that the government, in dealing with Indians, has made a clear distinction between the full-bloods and half-breeds, and has, in many cases at least, granted lands to half-breeds without restrictions, while, *in the same treaty,* limitations have been placed upon the right of the full-bloods to convey their lands.

In view of these facts, how can it be claimed that the courts have a right to *assume* that congress regarded the Sioux half-breeds as incompetent, and for this reason intended to prohibit them from conveying their lands?

But counsel contends that his construction must be placed upon the act because Mr. Manypenny, the Commissioner of Indian Affairs, and Mr. Wright of the Committee on Indian Affairs, gave it as their *opinion,* at the time the bill was before congress, that some legislation would be necessary to protect the interests of *"such portion* of these people as are incompetent to manage their own affairs." (Italics our own.)

A sufficient answer to this contention is, that an examination of the reports of the committeemen and of the act show, upon their face, that congress did not adopt the *opinions* of the committeemen, and did not follow their advice.

The committeemen advised some legislation for *"such portion* of these people as are incompetent." But counsel admits that the *act as passed,*

applies to both the competent and incompetent. It is apparent, therefore, that congress did not follow this advice; at least did not follow it *as given*. If it did not follow it as given, upon what theory is the court to assume that it was followed in part, or was followed at all?

It was a question for congress to finally determine what legislation was necessary, and it evidently decided from what it had heard and knew of the intelligence of these people that no restrictions were necessary.

The conclusive answer, however, to counsel's contention is, that in construing an act it is not competent to refer to the debates, or the expressions of opinion by the individual members of the body, in order to ascertain the purpose of the act.

It requires but little argument to show, that the intention of the legislature cannot be gathered from what individual members may have said concerning the purpose of the act. Congress is composed of between three and four hundred members. Some of them very much more intelligent, active and influential than others, but all are equal in power, and each one has as much right to impress his own peculiar views on enactments as the others. But comparatively few of this large body of men, ever express their views on any particular act, and if resort can be had to the views of those who expressed themselves, then by the same reasoning, those who did not give expression to their views could be subpoenaed to ascertain if their views corresponded with the others.

Again, it is well known that there are very few acts presented but there are many reasons given for its passage, and some members vote for it for one reason and some for another.

Furthermore, it sometimes happens, even in congress, that a member may give very foolish reasons for a very sensible measure, but this would not deter others from favoring it. If this method of ascertaining the intention of the legislature were resorted to, to clear up ambiguities, the difficulties would only be multiplied a hundred fold; for in such case the court would have to construe and interpret the law guage of each member who had given expression. Such a course of proceeding would entail endless delay, multiply existing difficulties, and result in the defeat of the present practical and business like administration of the law.

It is doubtless true that the courts may, under certain circumstances, refer to public proceedings, in order to aid them in interpreting a statute. One instance is, reference to the records to ascertain whether certain amendments were adopted or rejected. But this is upon an entirely different principle, for in such cases there is the *concerted action* of the body as a whole, as distinguished from the *individual expression* of a member.

Our position is not only founded on reason, but is sustained by the authorities.

In a late case, U. S. vs. Wong Kim, 169 U. S., 699, it was declared that the intention of the congress which framed the Fourteenth Amendment must be ascertained from the language of the act

itself, and that the debates in congress were not admissible for that purpose.

In the case of Aldridge vs. Williams, 3 Howard, 24, the court says:

> "In expounding this law the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of congress in the debate which took place upon its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of the members of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather the intention from the language there used, comparing it, when ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

The purpose of the act, then, must be ascertained from the language of the act itself, and not from some committeeman's opinion.

In the opening part of our argument on the construction to be given to the prohibitory clause of the Act of 1854, we stated that there were only two classes of cases to be found where restrictions upon the right to convey land had been made by the government.

1. Where the beneficiary is an incompetent.

2. Where some personal act of service was required of the grantee, as a condition precedent to his right to obtain the land.

We think it is manifest that congress did not regard these half-breeds as incompetent, because:

1. There is no language in the act indicating such a purpose, and a careful examination of the treaties negotiated with Indians, shows that when the government has intended to treat them as incompetents it has used language so clear and explicit that there could be no possible doubt as to its meaning.

2. Because, as Justice Brewer decided in the case of Felix vs. Patrick, *supra*, the courts have no right to assume that they were treated as incompetents in default of language clearly expressing such intent.

3. Because these half-breeds are shown to have been unusualy intelligent, and the history of the government's dealings with Indians shows that it has made a clear distinction between half-breeds and full-bloods.

4. Because the proposition that congress regarded these half-breeds as incompetent, and for this reason prohibited them from conveying their lands before the location of the scrip, but permitted them to convey the instant after location, is an argument that reduces itself to an absurdity and falls of its own weight.

If, therefore, these half-breeds were not regarded as incompetents, there was only one other

reason why congress should have placed any restrictions upon their right to convey, and that is because some personal act of service was required of them as a condition precedent to their right to obtain the land.

But no such act was required by the law. It is conceded by both the Secretary and counsel that these half-breeds could take their scrip, go to the local land office, locate the scrip upon any public land, not otherwise appropriated, and transfer the land the instant after the location, without ever having seen the land, without residing upon it for an instant, and without cultivating a foot of it.

Manifestly, therefore, no personal act of service was required of the scripee which necessitated a temporary restriction upon his right to convey, in order to secure the performance of the act.

Not only was there no *reason* why congress should have prohibited the scripee from conveying his land, but if congress had intended to do so, the act itself would have contained some specific provision requiring him to make *proof* of the fact that he had not conveyed, or agreed to convey, his land.

But neither does the act make any such requirement, nor has the Department, as a matter of practice, ever required any such proof.

It is but little short of the preposterous to assert that congress deliberately prohibited the scripees under this act from conveying their land until after they had located their scrip, and yet utterly neglected to require any proof whatsoever of the fact before issuing the title to them.

According to the Secretary, the conveyance of the land, before the location of the scrip, was such an essential violation of the Act of 1854 as to warrant him in canceling the location of the scrip three years after it had been located, as was done in the Stram case.

And yet congress made no provision whatever to guard against the violation of this most vital feature of the act.

The scripee could go to the land office, offer his scrip, receive his land, and no questions were asked and no proofs were required; and the only possible way of discovering whether he had violated this alleged provision of the law by conveying his land, was by reliance upon the accidental discovery of the violation by some contestant, who would call the Department's attention to the fact through his desire to obtain the land for himself.

Such a contention is an impeachment of the intelligence of congress.

If congress had intended to prohibit these half-breeds from conveying their lands, before the location of the scrip, it would have required the scripee to make proof of this fact before the title should issue to him, just as it did in the homestead and pre-emption acts.

Section 2291 of the Revised Statutes, being Section 3 of the Homestead Act, provides: That if the homesteader

> "Proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately

succeeding the time of filing the affidavit, *and makes affidavit that no part of such land has been alienated,* then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." (Italics our own.)

Section 2262 of the Revised Statutes, provides: That every pre-emptor shall make oath,

"That he has not settled upon or improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; *and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself;* and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, for a valuable consideration, shall be null and void." (Italics our own.)

Now, can it be possible that congress intended to prohibit these half-breeds from conveying their lands, before the location of the scrip, and yet required no proof of this essential fact, before issuing the title to them, while at the same time, it was

so extremely careful to provide that every homesteader and pre-emptor should, in a judicial proceeding, furnish sworn proof of the fact, that he had not conveyed, or agreed to convey, his land?

Of what avail is it to require that certain things shall be done, or not be done, if the law provides no means of enforcing such provisions?

What would be thought of a congress that should provide, that homesteaders should reside upon their land five years, should cultivate and improve it, and should not make any agreement to convey it, prior to the time they should receive their title from the government, and yet should not require proof of any of these facts, but should issue the title to the homesteader, at the end of the five years, without so much as even inquiring whether he had made any agreement to convey his land?

Everyone would say that a congress which enacted such a piece of legislation was utterly devoid of intelligence.

But is it any less absurd to assert that congress intended to prohibit the Sioux half-breeds from conveying their lands, until after the location of their scrip, and yet permitted the title to be issued to them without requiring even a verbal, unsworn statement that no contract had been made to convey the land?

There is but one conclusion to be drawn. In the case of homesteaders and pre-emptors, congress clearly intended to prohibit them from conveying their lands until they had established their resi-

dence upon and cultivation of the lands, and, consequently, was careful to require them to furnish sworn proof of these facts before conveying the title to them. But, in the case of the Act of 1854, congress did not intend to prohibit the conveyance of the land, and, therefore, no proof was required.

Not Only Was There no Reason for Prohibiting the Scripees from Agreeing to Convey the Lands, but, the Language of the Act Itself, Prohibiting Assignments of the Scrip, Cannot, Under the Ordinary Rules of Statutory Construction, Be Interpreted as Inhibiting Conveyances of the Land.

The act itself provides: "thou shall not assign *scrip.*" The Secretary and counsel assert that it means, "thou shalt not convey *land,* prior to the location of the scrip."

In other words, they contend that this prohibitory clause of the act needs interpretation.

The defendants, on the other hand, contend that it interprets itself; that the language of the act means just exactly what it says, that the scripee should not assign the written certificate of scrip; that the government had undertaken to convey the title to him and had issued the scrip as the evidence of his right, but had declined to deal with his assigns and issue the title to them, and, therefore, prohibited the assignment of the scrip.

They contend that the language of the prohibitory clause of the act is as clear as English can make it, and that the only ambiguity that arises in considering it, is by reason of the tortured application that counsel seeks to make of it.

The cardinal rule of statutory construction is that the meaning must be obtained from the language of the statute, if the language is plain; and, if the language is plain and unambiguous, that the statute is its own expositor, and there is nothing for the court to interpret.

It is not within the province of the courts to determine what are, and what are not, the legitimate objects and purposes of legislation. This right belongs exclusively to the legislature, and the courts cannot, under the guise of interpretation, declare that the object of a statute should be one thing, when the language, according to the ordinary meaning of the words, shows that its purpose is something else.

This doctrine is fully sustained by the authorities.

Black, On Interpretation of Laws, page 35, says:

> "If the language of the statute is plain and free from ambiguity, and expresses a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended to convey. In other words, the statute must be interpreted literally. *Even though the court should be convinced that some other meaning was really intended by the law making power, and even*

though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law, and the courts must not depart from it."

Sutherland, On Statutory Construction, Sec. 234, says:

"How the intention is to be ascertained is only answered by the principles and rules of exposition. If a statute is certain, plain and unambiguous, so that no doubt arises *from its own terms* as to its scope and meaning, a bare reading suffices; then interpretation is needless."

In section 235, he says:

"It is the intent of the law that is to be ascertained, and the courts do not substitute their views of what is just and expedient. Courts are not at liberty to speculate upon the intention of the legislature, where the words are clear, and construe an act upon their own notions of what *ought to have been enacted.* The wisdom of a statute is not a judicial question, nor can courts correct what they may deem excesses or omissions in legislation, or relieve against the occasionally harsh operations of statutory provisions without danger of doing more mischief than good."

And again in section 237, quoting from Alexander vs. Worthington, 5 Md., 485, he says:

"The language of a statute is its most

natural expositor; and where its language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous consideration." (Italics in these quotaions our own.)

This principle has been applied in a striking way, in the recent case of Cone vs. Nimocks, 78 Minn., 249.

The question that was under consideration in that case was the construction of a statute which provided that a foreign executor or administrator must file an authenticated copy of his appointment in Minnesota before he could foreclose a mortgage by advertisement.

A foreign executor had assigned a mortgage and the assignee had proceeded to foreclose it by advertisement without filing a copy of the appointment of his assignor, the executor.

The foreclosure was attacked and it was urged with much force that there was just as much *reason* for requiring the appointment to be filed where the mortgage was foreclosed by the assignee of an executor as where it was foreclosed by the executor himself.

In the course of the opinion Justice Mitchell said:

> "It may also be admitted that, where the power is exercised by an assignee of a foreign executor or administrator, substantially the same reasons exist for requiring that there be record evidence that the person who executed the assignment was what he purported to be,

to-wit: The personal representative of the deceased mortgagee. Such a case, however, is not within the letter of the statute, and the question is whether there is any rule of construction by which it can be included."

But, Justice Mitchell speaking for the court, further said:

"There is no ambiguity of language here. By its clear and plain language this proviso applies only to the exercise of the power by the executor or administrator. *The mere fact that there existed the same reasons* for applying the same condition to the exercise of the power by an assignee of the executor or administrator, will not justify a court in including such a case within the statute, when, according to its plain and unequivocal language, the legislature has omitted it." (Italics our own.)

Likewise, in the case at bar, counsel urges that there were *reasons* why congress should have prohibited the scripee from conveying his land, prior to the location of the scrip.

We have already attempted to show that there were no such reasons, but conceding that there were, under the authorities cited above, if the language of the act, prohibiting the assignment of the *scrip itself*, will accomplish some *lawful purpose*, then no court has the right or power to say that congress intended to prohibit the conveyance of the land, prior to the location of the scrip.

If the language prohibiting an assignment

of the scrip can be given any legal effect; if an interpretation of the language of the act, as it stands, according to the ordinary meaning of the words used, will lead to a sensible result, and not to an absurd and ridiculous conclusion, then it is not within the province of the courts to declare that there were other and greater objects that could have been accomplished, or that congress *ought* to have legislated differently for half-breeds than it would have for white men, for this, according to the authorities quoted above, would be "substituting the judgment" of the court for the judgment of congress, and would be an interpretation "controlled by extraneous considerations", and not by the plain and ordinary meaning of the statute itself.

The *test,* then, is, will the statute, as it stands, according to the fair and ordinary meaning of the language used, accomplish some lawful purpose? If it will, the statute is its own expositor and there is nothing for the court to interpret.

What lawful purpose, then, does this prohibition against the assignment of the *scrip itself* accomplish?

It prohibits the scripee from assigning his right to the land so as to enable the assignee to demand the title in his own name, but compels the land department to issue the title direct to the scripee, and thus prevents the government from becoming involved in the disputes that would have been certain to arise over the title to the scrip and land, if assignments of the scrip had been permitted. It also protects the government from the pos-

sibility of frauds being committed against it through the location of forged assignments of the scrip.

A very simple illustration will clear away a good deal of the mystery and complexity with which the Secretary and counsel have surrounded this prohibitory clause of the Act of 1854, and will show that no such construction can be given to the act as they contend for.

Suppose that the government should desire to obtain, for military or other purposes, a section of land owned by John Jones, and should enter into a contract with him whereby it would agree, in exchange for his land, to give him an equal amount of land out of any part of the public domain, and should issue to him a piece of scrip certifying that Jones was entitled to receive from the government the title to a section of land to be selected by him, and the agreement and the scrip should contain this provision: "Provided, however, that no assignment or transfer of said certificate or scrip shall be valid." And suppose that, thereafter, but before he had received his title from the government, Jones should agree to convey the land he was entitled to receive to Brown; would counsel, or any court, maintain that Jones had violated the provision against the assignment of the scrip, and that he must go through the senseless proceeding of cancelling the contract with Brown, receive his title from the government after the cancellation, and then again convey to Brown?

If Jones had attempted to assign to Brown the

right to receive the title direct, or if, after Jones had agreed to convey to Brown, the latter had demanded the title in his own name, the government, under these circumstances, could refuse to convey to Brown, because it could say, we have, by our contract with Jones, refused to recognize his right to assign to anyone alse the right to receive the title. But it could not, and would not, refuse to convey to Jones *because Jones had already agreed to convey to Brown.*

What is the difference in principle between the illustration given and the facts under consideration in the case at bar?

The Sioux half-breeds were in possession of the Lake Pepin reservation under a grant from the the Sioux nation of Indians, which grant had been recognized by the government in the treaty of Prairie du Chien, entered into in 1830. These half-breeds, under the terms of this treaty, had gone upon this reservation and resided there for twenty-five years. At the end of that period, the government, desiring to obtain the reservation and throw it open to public settlement, entered into an agreement with these half-breeds, whereby it agreed, "in exchange" for the reservation, to convey to each half-breed, *in severalty and in fee,* an amount of land equal to his proportional part of the reservation, and to be selected, not by the government, but by himself.

These half-breeds were so numerous, and their range of choice of lands was so wide, that it was impracticable to convey to each one the land he was

entitled to receive at the same time that the half-breeds conveyed the reservation to the government. And so, *as a mere method of convenience in transferring the title, and for no other purpose,* the government, in order to identify the half-breeds and to inform the land officials who was entitled to receive land, under the act, and the amount each was to receive, issued certificates or scrip, the only limitation in the entire act being, that the *scrip itself* should not be assignable.

Now, what is there in these facts to compel any different construction of the language of the Act of 1854, than to the same identical language we used in the illustration of Jones and Brown?

We contend, therefore, that the language of the act, construed as it stands according to the fair import of the words used, accomplishes a lawful purpose in preventing the scripee from assigning to another his right to receive the title.

Whether this purpose was of sufficient importance is a question for the legislature and not for the courts. The courts cannot, by interpretation overturn an act, simply because, in the judgment of the court, there were other and greater objects that might have been accomplished.

But a further examination of the question will show that the reasons for the interpretation that we contend for are by no means insignificant.

If the statute had not contained this provision the scripee could have assigned his rights to the scrip itself. His assignee in turn could have assigned it and so it could have gone on indefinitely.

The scrip, under these circumstances, would have practically been a negotiable order for title to so many acres of land, and, when it finally came into the hands of the government for redemption, after having passed through numerous persons, the responsibility of determining as to which was the legal owner and entitled to locate it and receive the title to the land, would have devolved upon the government officials. This would have involved a great amount of unnecessary work and inconvenience to the Department.

But, aside from the mere question of inconvenience, if assignments of the scrip had been permitted, the government might, under certain circumstances, have become liable to redeem the scrip more than once.

If assignments had not been prohibited a scripee could have taken a piece of scrip and written on the back thereof, "I hereby assign all my right, title and interest in the within scrip to John Smith and authorize the government to issue the title to him."

Suppose a piece of scrip had been stolen and an assignment forged, but the officials had not discovered the fraud but had treated the assignment as genuine and had issued the title to the forger, and he in turn had transferred the land to an innocent purchaser. Under such circumstances the government would have been defrauded; for, as it had permitted assignments of the scrip, it undertook the responsibility of seeing that the title was issued to the proper party, and upon a showing

by the scripee that the scrip had been stolen and the assignment forged, the governmnt would be compelled to give the scripee an equal amount of land, and thus redeem the scrip a second time.

On the other hand, under the law as it actually stands, no such situation could ever arise. For, no matter who brought the scrip to the land office, no matter whether the scrip had been stolen or not, no matter whether the land had been sold or not, the government always issued the title to the scripee, and consequently neither the government or the scripee could be defrauded.

The reasons that we assign are not merely fanciful, for the actual experience of the Department with scrip, where assignment have been permitted, shows that great inconvenience has resulted, and that the government has at times been protected from attempted frauds by this very provision of the Act of 1854.

In the case of Lettrius Alrio, 3 L. D. 44, the application to locate Indemnity Scrip was denied, because there appeared to be certain defects in the "chain of title." The decision says:

> "For these reasons the chain of title from the original confirmee to the person or persons applying for the indemnity, must be established to the satisfaction of this office before the scrip will be issued and delivered."

In 1 L. D., on pages 300, 301 and 302, will be found reported six cases, in all of which the scrip had to be returned for correction because of some

defect in the assignments. Four of these decisions were rendered between July 17th and July 25, 1882. If that number of mistakes could occur within a week, it can easily be imagined what inconvenience the Department is put to by this method of handling scrip; where assignments are permitted, every time a piece of scrip is presented the officers have to examine the chain of title as carefully as one would an abstract to a piece of real estate.

But the inconvenience is not the controlling consideration. Why are the officials so careful in examining these "chains of title?" It is because they recognize the fact that if they should make a mistake and issue the title to the wrong person, the government would have to redeem the scrip a second time. Numerous other cases might be cited showing the evils that follow where assignments of scrip are permitted, but the ones cited illustrate the principle as well as a hundred.

We now desire to call the attention of the court to the case of Walter Bourke, 12 L. D., 106, which illustrates how the prohibition against the assignment of scrip, in the Act of 1854, operates to prevent the possibility of frauds either upon the scripee or the government.

The facts in the case were that Wallace had purchased the land the half-breed, Bourke, was entitled to, and had obtained the scrip and usual power of attorney to locate it. Afterwards the half-breed sold the land to one, Henry F. Wells, and delivered to him also a power of attorney to locate the scrip. Wells, then, upon making affi-

davit that the original scrip had been lost, induced the Department to issue to him a duplicate piece of scrip and he located this duplicate scrip on a certain piece of land in the name of Bourke.

Thereafter, Wallace came forward with the original scrip and offered to locate it in the name of Bourke. The offer was refused because the records showed that a duplicate of said scrip had already been located by Henry F. Wells as attorney in fact for Bourke.

Wallace offered to show that the original scrip had never been lost, and that the duplicate had been obtained by fraud and false affidavits.

But the Secretary replied:

> "Admitting the truth of these charges, it does not affect the question now presented by this application which is, whether a *second location* of scrip will be allowed in favor of a scripee while the records show that the title is outsanding in him for another tract of land located for him on the same scrip. If the facts are true as alleged by the applicant, *the courts are open for his relief.*" (Italics our own.)

In other words, the Secretary practically said to Wallace, all the government contracted to do was to issue the title to Bourke; it has done so, and it is immaterial whether he obtained his title under the original or duplicate scrip; the government has not been injured by the fraud which you allege has been committed for it has cancelled its obligation to the scripee; Bourke has not been affected by it for he has received his title to the land

and has not made any complaint; if, as you claim, Bourke sold the land to you and not to Wells, and the latter procured the location of the duplicate scrip through fraud and false affidavits, that is a matter between you and Wells, but it is no concern of the land officials; the land department was not established to settle disputes between individuals over the title to land, "the courts are open to you for your relief."

Suppose, however, that the Act of 1854, had permitted assignments, and that Wells, instead of producing false affidavits, had secured the location of the scrip by means of a forged assignment, and then had conveyed the land to an innocent purchaser, and, thereafter, the real owner of the scrip had proven the fraud; in such a case as this, the government would have been compelled to redeem the scrip a second time.

Again, if assignments had been permitted, and someone had, by false and fraudulent representations induced a scripee to execute an assignment, and the scrip had been located under such an assignment, and the land transferred to an innocent purchaser, the scripee would have been defrauded out of his land, for in such case the government would be under no obligation to give the scripee another piece of land.

But, under the law as it exists, neither of the events mentioned above can happen, for no matter who brings the scrip to the land office, no matter whether there has been an attempted assignment or not, the government always issues the title to the

scripee and to no one else. Thus the government is always assured of redeeming the scrip upon a single location, and every scripee is assured of receiving the title to an amount of land specified in the scrip.

We certainly have shown, then, that the clause of the act, prohibiting assignments of the scrip, when interpreted according to the fair import of the language as it stands, operates to accomplish a lawful, sensible and important purpose; for it saves the department great inconvenience, prevents the *possibility* of frauds being committed against the government, through the location of the scrip, and asures the scripee of the certainty of receiving his title, under any and all circumstances.

If this be so, what right has a court, under the authorities, to substitute its judgment for that of congress and declare that there was some other and greater object that might and ought to have been accomplished? And, if a prohibition against the assignment of the *scrip itself*, will accomplish any lawful purpose, what power has a court to assume, infer or argue that congress, when it prohibited assignments of the scrip, intended to prohibit conveyances of the land, prior to the location of the scrip?

But counsel says, in numerous other laws congress has permitted assignments of scrip and issued the title direct to the assignee, and therefore, it is unreasonable to suppose that the purpose congress had in view in the Act of 1854 was to prevent

the assignee from obtaining the title in his own name.

It does not follow that because one congress had at one time adopted a certain remedy for one law, that another congress would not adopt another remedy for another law.

From time immemorial, legislatures have been experimenting with remedial laws. And it is not infrequent to find that the legislature of the same state has adopted a remedy, afterwards repealed it, and then re-adopted it.

But all the force is taken out of counsel's argument by the fact that congress itself has made just such changes in the pre-emption law; prohibiting at one time the entryman from assigning to another the right to receive the title from the government, later permitting him to assign the right so that the patent might issue in the name of the assignee, and still later, again prohibiting the entryman from assigning the right to receive the title in the name of the assignee.

The Pre-emption Act of 1830 prohibited assignments of the pre-emption right and required the title to be issued to the pre-emptor himself. The Act of 1832 repealed this provision and provided that pre-emptors might "assign and transfer their certificate of purchase, or final receipts, *and patents may issue in the name of the assignee.*" (Italics our own.)

But in 1841, this latter provision was in turn

repealed and the former remedy again adopted, by providing that,

> "All assignments and transfers of the right of pre-emption given by this act, prior to the issuance of the patent, shall be null and void."

Now, if congress at one time permitted *pre-emptors* to assign their right to receive the title to another, and at another time prohibited it, why is it so unreasonable, as counsel asserts, to suppose that one congress would permit *scripees* to assign to another their right to receive the title, and that another congress would prohibit it?

We now desire to call the attention of the court to an argument designed to show that the very purpose of the enactment of that clause of the pre-emption Act of 1841, which we have heretofore quoted, was simply to prevent the pre-emptor from assigning to another the right to receive the title from the government, and to permit the government to deal directly with the pre-emptor, and not with his assignees, in regard to the title.

If we can establish that this was the purpose of this prohibitory clause of the pre-emption act, then it can be fairly argued that it is reasonable, or at least that it is not absurd, to suppose that congress had the same object in view in enacting the the prohibitory clause of the Act of 1854; especially as the natural interpretation of the language of the act leads to the conclusion, that it was the

assignment of the scrip itself, and not the conveyance of the land, that was to be prohibited.

As proof of the fact that the object of this clause of the pre-emption act was merely to prevent the pre-emptor from assigning to another the right to receive the title from the government, we call attention to the provisions of the act itself.

Sec. 2262 of the Revised Statutes provides that pre-emptors shall not,

> "Directly or indirectly, make any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself."

Section 2263 of the same act provides:

> "And all assignments and transfers of the right hereby secured, prior to the issuance of the patent, shall be null and void."

Now, it cannot be said that the purpose of the latter provision was to prevent the conveyance of the land, for Sec. 2262 specifically prohibits all conveyances, or contracts to convey, and it would be absurd to claim that congress enacted two sections, the one directly following the other, to accomplish the same purpose.

As the purpose of Sec. 2262 was to prevent conveyances of the land, the purpose of Sec. 2263 must have been simply to prevent the pre-emptor from

assigning to another the right to receive the patent in the name of the assignee.

This position is also borne out by the following cases:

Camp vs. Smith, 2 Minn., 131.
Myers vs. Croft, 80 U. S., 291.
Book 20, L. Ed., 562.

In the case of Camp vs. Smith, a pre-emptor had sold his land after the entry, but "prior to the issuance of the patent." After the patent had issued the pre-emptor conveyed the land to another person, and, thereupon, a contest arose between the two grantees, the later grantee contending that the convyance to the first grantee was void as being in violation of that clause of the act which prohibited all assignments and transfers "prior to the issuance of the patent."

But the court held that the purpose of this provision was merely to permit the government to deal directly with the pre-emptor, in regard to the title, and not with his assignees.

At the bottom of page 138, the court says:

> "It is, however, contended by the counsel for defendant, that it was the intention of congress not only to prohibit the assignment or transfer of the *right* of pre-emption strictly so called, but also of the sale of the *land itself* or the interest therein, which the pre-emptor obtained by virtue of his purchase."
>
> "We do not think that the act referred to, sustains the position assumed. It shows, rather, that in the opinion of congress, the inhibi-

tion, if it extended to anything other than the transfer of the mere personal privilege of becoming the exclusive purchaser, was intended only to prevent the pre-emptor from assigning his certificate of purchase, *so as to enable the assignee to obtain a patent in his own name.*"

Again, on page 140, the Court says:

"Congress, therefore, determined that in all entries by pre-emption the patent shall issue to the pre-emptor only. *This relieves the department from all responsibility*, and renders the duties of officers, in this particular, plain and simple."

Again, on page 145, the Court says:

"We hold, therefore, that the prohibition contained in section twelve of the Act of September 4, 1841, is intended *only* to prevent the transfer of the mere right of pre-emption prior to the time of the entry, and the assignment of the certificate of purchase in such manner as to enable the assignee to secure the patent in his own name." (Italics in above quotations our own.)

This clause of the pre-emption act was under consideration in the case of Myers vs. Croft, *supra*.

In the course of the decision the court says:

"The inquiry is: What did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtain-

ed his patent, or did the disability extend only to the pre-emption *right?* Looking at the language employed, as well as the policy of congress on the subject, it would seem that the interdiction was intended to apply to the *right* secured by the act, and did not go further."

According to these cases, then, congress deliberately incorporated this prohibitory clause in the pre-emption act for the very *purpose,* to use the language of the court in Camp vs. Smith, of preventing the assignee from obtaining the patent in his own name.

If congress regarded this as a legitimate object of legislation in one act, it is just as reasonable to argue that congress intended to accomplish the same purpose in another act. And as the interpretation of the language of the Act of 1854, according to the natural meaning of the words, operates to accomplish this lawful purpose, then, under the authorities which we cited at the beginning of our argument on this point, it is not within the province of the courts to say that congress intended to accomplish some other purpose, even though the other purpose is considered by the court of greater importance.

There is another argument to be drawn from the cases of Camp vs. Smith and Myers vs. Croft, which is applicable to the case at bar.

In both of these cases it was contended that the language of the pre-emption act, prohibiting assignments of the pre-emption *right,* was intended

to prohibit the conveyance of the *land,* prior to the issuance of the patent, just as it is contended in the case at bar, that the language prohibiting assignments of the *scrip* was intended to prevent conveyances of the *land,* prior to the location of the scrip.

But the courts in those cases held, as a matter of substantive law, that there is a plain and well recognized distinction between a prohibition against the assignment of a *right* to land, and a prohibition against the conveyance of the *land itself;* and further held, as a rule of construction, that the courts will never assume that the legislature has intended to prohibit the alienation of land, unless the prohibition runs directly against the land itself, or unless the language used would not bear any other interpretation.

In Camp vs. Smith, *supra,* on page 140, the court says:

> "Had it been intended to prohibit the sale of the land, or the interest acquired by the purchaser, the language used would have been adapted to the object to be accomplished. We find in other instances, where it is sought to restrain the transfer of the land, that the language is plain and *admits of but one interpretation.* The act entitled 'An Act to Increase the Present Military Establishment of the United States, and for Other Purposes,' passed July 5, 1838, provides in section 29, that certain soldiers shall be entitled to one hundred and sixty acres of land, 'which *land* shall be patented to the soldier or his heirs, and be not assignable until patented.' U. S. St. Vol. 5, 260. Here the intention to prohibit the transfer of the *land* is clearly expressed. Again,

> the 'Act entitled an Act to Provide for the Armed Occupation and Settlement of the Unsettled part of the Peninsula of East Florida,' passed August 4, 1842, gave to each settler the right to 160 acres of land, and also provided in section 4, 'that all sales, gifts, etc., of the land acquired thereby, made at any time before the issuing of the patent, shall be null and void.' U. S. St. Vol. 5, 503. Here again we find the term 'land' made use of: *and for the reason that it is about the only word that would express the idea intended to be conveyed.* How natural and appropriate it would have been to have said in the Act of September 4, 1841, that 'all assignments and transfers of the *land* prior to the issuing of the patent shall be null and void,' had that been the intention." (Italics our own.)

Paraphrasing the language of the court, how natural and appropriate it would have been to have said in the Act of 1854, that "all assignments and transfers of the *land,* prior to the location of the scrip, shall be null and void," had that been the intention.

In the case of Myers vs. Croft, supra, the court says:

> "If it had been the purpose of congress to attain the object contended for it would have declared the *lands themselves unalienable.*" (Italics our own.)

Furthermore, there were much stronger reasons for holding that the prohibitory clause of the pre-emption act was intended to prohibit convey-

ances of the land, prior to the issuance of the patent, than for holding that the prohibitory clause of the Act of 1854 was intended to prohibit conveyances of the land, prior to the location of the scrip. For, as we have shown heretofore, there were certain acts of personal service required of the pre-emptor as a condition precedent to his right to obtain the land, and he was temporarily prohibited from conveying his land to secure the performance of these acts.

And even after he had made final proof, and before the issuance of the patent, the law invested the Department with the power to cancel his entry if it should discover that he had not complied with the law in all respects, but had obtained his final receipt upon perjured testimony.

It might very well have been said, then, that there was good reason why congress should have prohibited the pre-emptor from conveying his land until the last step had been taken by the Department and it had dispossessed itself of jurisdiction by issuing the patent, because if he were allowed to sell his land before that time it might afterwards be discovered that the entry would have to be cancelled for fraud, notwithstanding that he had in the meantime sold his land to an innocent purchaser, in fact.

But no such reasons are applicable to these half-breeds. No personal acts of service were required of them, and the only condition precedent to be performed by them in order to entitle them to receive their lands was to convey their interest in

the reservation to the government. But this they had already done before the scrip was delivered to them.

The fundamental fallacy of the Secretary's position lies in his assumption that there is no distinction between a prohibition against the assignment of a right to land, and a prohibition against the transfer of the land itself.

The act says to the half-breed "thou shall not assign scrip." The Secretary asserts that this means, "thou shall not convey land, prior to the location of the scrip." In other words, that the prohibition against the assignment of scrip is equivalent, in law, to a prohibition against the conveyance of land. And counsel agrees with him, for on page 95 of his brief in the court below he says:

> "It seems absurd to say that you can sell the right itself, and not the evidence of the right, for the one logically goes with the other."

It may seem absurd to counsel, but that is just exactly what the courts decided could be done in the case of Camp vs. Smith, *supra,* and Myers vs. Croft, *supra.* In both of these cases the court distinctly decided that the pre-emptor could not assign his pre-emption *right,* and just as distinctly decided that he could sell his *land.*

Nor is the pre-emption act the only instance in which congress has recognized the principle that there is a distinction between a prohibition against

the assignment of a right to land, and a prohibition against the transfer of the land itself.

It is provided by Sec. 3, Chap. 316, 29 St., 246,

> "That the *right* of homestead entry conferred by the provisions of this act shall not be assignable, *and* no conveyance, sale or transfer of the *land* so entered shall be held valid or of any effect if made before patent has issued." (Italics our own.)

It will be noted that in this act, as in the preemption act, congress prohibited not only the assignment of the *right*, but also, and in addition, prohibited a transfer of the *land*.

But if, as counsel and the Secretary contend, a prohibition against the assignment of the right is equivalent to and will operate to prevent a transfer of the land, why was congress so careful in each one of these acts to provide that neither could the right be assigned or the land transferred?

It is perfectly manifest that congress clearly recognized that there was a distinction between the two and that a prohibition against the assignment of the right would not prevent a transfer of the land.

Whatever other differences counsel may be able to discover between the cases of Camp vs. Smith and Myers vs. Croft, and the case at bar, it is beyond dispute that the courts in these cases declared, as an abstract proposition, that there is a plain and well recognized distinction between a prohibition against the assignment of a right to

land and a prohibition against the transfer of the land itself.

We now desire briefly to call the attention of the court to a case in which that distinction is made even plainer than in the two cases cited above; the case of Dole vs. Wilson, 20 Minn., 308.

In this case certain Chippewa half-breed scrip, twenty-eight pieces, were sold to one, Wilson, and at the time of the sale and delivery of the scrip, but before its location, the half-breeds agreed to convey to Wilson the land to be located under the scrip.

This scrip was unassignable, the same as Sioux half-breed scrip, and had to be located in the name of the scripees.

The transaction was attacked on identically the same grounds as in the Stram case, that the agreement to convey the lands was in violation of the law prohibiting the assignment of the scrip.

But the court held that while the scrip was not assignable, the land was transferable.

On page 311, the court says:

> "The privilege of each half-breed to select 80 acres of land was a personal right, and therefore the scrip, issued as the evidence of the right, was non-assignable. And it was accordingly held by the general land office that transfers of the scrip were void, and that a certificate could only be located in the *name* of the half-breed in whose favor it was issued."

Here is a direct decision that the scrip itself is not assignable.

On page 312, the court says:

> "As to the agreements to convey, they are certainly per se unobjectionable. The treaty not only contains no prohibition of such conveyance, but expressly provides that the lands are to be secured to the half-breeds by patents in the usual form, i. e., in the form in which patents are made to any ordinary purchaser of public lands, without restraint upon the power of alienation."

In this case, then, it is distinctly decided that the *scrip* is not assignable, and is just as distinctly decided that the *land*, taken under the scrip, is transferable, notwithstanding the prohibition against the assignment of the scrip.

How, then, can it be contended by the Secretary and counsel that a prohibition against the assignment of scrip is equivalent, in law, to a prohibition against the conveyance of land?

The decisions of Camp vs. Smith, Myers vs. Croft and Dole vs. Wilson, then, settle two questions that are involved in the case at bar.

1. That there is a plain and well recognized distinction between a prohibition against the assignment of a *right* to land, and a prohibition against the transfer of the *land itself*.

If this be so, it does not follow, as the Secretary and counsel assume, that when congress prohibited the assignment of scrip it intended to prohibit conveyances of the land.

2. That, as a rule of construction, the courts

will never assume that the legislature has intended to prohibit the alienation of land, unless the prohibition runs directly against the land itself, or unless the language used would not bear any other interpretation.

If this is a true rule of construction, as is declared by these courts, then it cannot be held that the prohibitory clause of the Act of 1854 was intended to prohibit conveyances of the land, because the prohibtion does not run against the land but against the scrip, and, secondly, because language prohibiting the assignment of scrip is capable of a sensible, reasonable and natural interpretation, without holding that it was intended to prevent conveyances of the land.

The construction contended for by the Secretary and counsel makes the prohibitory clause of the Act of 1854 operate as a restriction upon the right of the scripees to alienate their lands. We have already discussed certain phases of this question of restrictions upon the right of alienation, and now desire to examine it more at length, and as a substantive proposition of law.

THE RIGHT OF ALIENATION.

The right of alienation has not always existed. The inalienability of lands was the cornerstone of the feudal system, and even a free man could not alienate his lands until about the year 1290.

This right was not obtained until after centuries of contest with the feudal lords, as we are told

in Washburn on Real Property, (4th Ed.) on pages 78, 79 and 80, where will be found a concise history of the growth of this right.

But this right once having been obtained has never been surrendered. The right has always existed in this country, and is highly favored both by courts and legislatures. In this age, land is almost as much the subject of exchange as personal property. Modern commerce, trade and civilization could never have reached its present state of development, if the old barriers preventing the transfer of lands had not been torn down.

We do not mean to argue from this that congress has no *power* to restrict the alienation of lands. But we do contend, that because of this general tendency to enlarge, rather than to restrict this right, that it is fair to infer that the power has not been exercised except for good and sufficient reasons.

We also contend, that because of this general tendency, and by reason of the high favor in which this right is held, that the courts will assume that the legislature has not intended to interfere with the right of alienation, unless it be by the use of language so clear and explicit that there can be no possible doubt as to its meaning.

The following are a few of the cases that uphold this doctrine:

Knight vs. Leary, 54 Wis., 459.
Webster vs. Luther, 50 Minn., 77.
Camp vs. Smith, 2 Minn., 131.
Webster vs. Luther, 163 U. S., 331.

In Knight vs. Leary, the Court says:

"We are unable to concur in these views. Without entering into an extended discussion of the subject, it is sufficient to say that the law does not favor restraints upon alienation *and nothing short of a positive provision to that effect* will justify a court in holding that a statute imposes such restraints." (Italics our own.)

In Camp vs. Smith, the court says:

"Land in the United States is as much the subject of traffic almost as merchandise, and that trade is rather encouraged than restricted by law.

"On grounds of public policy, therefore, such an interpretation should be given to the pre-emption law as will not interfere with the free transfer of land in the state; and to that end it should, if necessary, be strictly construed, so as to not prohibit the assignment or transfer of anything not specifically and unmistakably designated."

And the Supreme Court of the United States in the case of Webster vs. Luther, *supra*, says: "On the other hand, the general rule of law discourages all restraints upon alienation."

Having shown what the policy of the courts is in regard to restrictions upon the right of alienation as affecting citizens, we now propose to examine that question with reference to its bearing on half-breeds and Indians.

Wherever Grants Have Been Made to Indians They Have Been Held by the Courts to Be Free from Restrictions, Unless the Intent to Restrict Is Clearly Expressed.

In the court below, counsel expended much time and cited many cases to show that the policy of the government has always been to treat Indians as wards of the nation, and to place restrictions upon their right to convey lands granted to them.

Starting with this as a premise, counsel has reasoned, by analogy, that congress intended to prohibit the Sioux half-breeds from conveying their lands, until after the location of the scrip.

The position of the defendants on this question is, that while this has been the general policy of the government, yet the instances where Indians have been allowed to convey, free from all restrictions, are numerous, and that in construing grants to Indians the courts have adopted the same rules of construction as in cases of grants to citizens, and have held such grants free from restrictions, unless the intent to restrict is clear and apparent.

We have already cited several treaties where unconditional grants were made both to half-breeds and full bloods. We now call attention to the following cases in which courts have decided that no restrictions were imposed, and we shall attempt to show, that in reason and on construction of the language used, there is less cause for holding that

restrictions on the right to convey were intended in the Act of 1854, than in the cases cited:

Hartman vs. Warren, 19 L. D., 65.
Hartman vs. Warren, 76 Fed. Rep., 157.
Dole vs. Wilson, 20 Minn., 308.
Doe vs. Wilson, 64 U. S., 457.
Book 16, Lawyers Ed., 91.
Crews vs. Burcham, 66 U. S., 352.
Book 17, Lawyers Ed., 91.
Jones vs. Meehan, 175 U. S., 1.
Book 44, Lawyers Ed., 49.

The case of Hartman vs. Warren arose on a construction of the seventh sub-division of Art. 2 of a treaty with the Chippewas, 10 St. at Large, 1109, which provides:

> 7th. "Each head of a family or single person over 21 years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, *to be selected by them under the direction of the President,* and which shall be secured to them by patent in the usual form." (Italics our own.)

As a means of identifying these half-breeds, scrip was issued, as in the case of the Sioux half-breeds, which scrip was in the following form, to-wit:

Department of the Interior,

Office of Indian Affairs, ...186

I hereby certify that .....of .....,in the state of .....,
is one of the persons described in the provisions contained in the treaty of September 30, 1854, with the Chippewas of Lake Superior, and that the said ..... is entitled to eighty acres of land as therein provided.

It is hereby expressly declared that any sale, transfer, mortgage, assignment, or pledge of this certificate, *or any right accruing under it*, will not be recognized as valid by the United States; and that the patent of lands located by virtue thereof *shall be issued directly to the above named reservee, or his or her heirs, and shall in nowise inure to the benefit of any other person or persons;* and that the object and purpose of this certificate is to *identify* the said above named..... as one of the persons entitled to the benefits of the provisions of the seventh clause of the second article of the treaty aforesaid.

Given under my hand and seal of the Department of the Interior, this day and year first above written.

.....

Commisioner.

(Italics our own.)

The practice of handling the scrip and disposing of the lands by powers of attorney, one to locate the scrip in the name of the half-breed, and the other to sell the land when located, the same as was done with the Sioux half-breed scrip, was soon adopted.

Warren, a Chippewa half-breed, used his scrip in this way, and it was located on a part of Section 30, the same section that is in controversy in the case at bar.

The transaction was attacked on the same grounds as was the arrangement between Stram and Eaton. We quote a part of the fourth ground of contest as it appears on page 65, 19 L. D:

> "4th. That prior to the time of said attempted location, said James H. Warren, for a valuable consideration to him paid, parted with said certificate of scrip, and in order to effectuate the bargain and sale made by him, and to evade the express prohibition of the law and to permit his vendees to accomplish by circumlocution and subterfuge, a fraud and imposition upon the officers of the law, had signed and acknowledged certain powers of attorney, one to locate the land, and the other to sell the same after its location."

Here was a direct attack upon the right of the half-breed to sell his land prior to the location of the scrip, but Secretary Smith held the location good, and that Warren had a right to dispose of his land in this way.

The case was carried into the courts and the decision will be found in the 76 Fed. Rep., 157.

In the statement of facts, on page 158, the court says: Hartman made application to contest on the ground that the entry of Warren *was not made by or for him, and that he has unlawfully parted with his scrip before the entry was made.* And a little later on the court says, that for the purposes of the case we will concede this to be the legal effect of the averments of the bill.

The decision sustained the ruling made by the Secretary.

The case of Dole vs. Wilson, 20 Minn., 308, involved the construction of this same clause of the treaty with the Chippewas.

The facts were that Dole had sold to Wilson 28 pieces of this scrip and delivered the same to the purchaser, and each piece of scrip was accompanied by a contract made by each half-breed in which the latter agreed to convey the land to be located under the scrip.

It was contended that the transaction was illegal. The court held that the *scrip itself* was unassignable, "and that a certificate could only be located in the *name* of the half-breed in whose favor it was issued." But the court further held that the agreements to convey the land were valid.

In these Chippewa half-breed cases, the courts, then, have held that agreements to convey the land, made prior to the location of the scrip, are valid, notwithstanding the prohibition against the assignment or sale of the scrip.

But counsel says, there was no prohibition against the sale of the land in the treaty with the Chippewas, and, therefore, the above cases are not in point. Neither was there any prohibition against the sale of the land in the Act of 1854, except on the assumption that the prohibition against the assignment of the scrip was intended to prevent the sale of the land.

Counsel makes one further distinction and that is, that the Act of 1854 itself prohibits assignments of the scrip while the treaty does not, the prohibition against the assignment of the scrip having been made by the executive department.

We shall now attempt to show that the treaty is to be construed just as though it contained the language prohibiting assignments of the scrip.

The treaty provides that the half-breeds "shall be entitled to eighty acres of land, to be selected by them, *under the direction of the President.*"

This clause, "under the direction of the President," conferred upon the executive department the authority to determine the manner and method of transferring the title to these half-breds.

The executive department, in pursuance of the authority conferred upon it by the treaty itself, provided that scrip should issue and that no "sale, assignment or pledge" of said scrip should be valid. That the executive department did this is manifest from a quotation which we make from Hartman vs. Warren, 19 L. D., page 71:

"March 12th, 1856, the Commissioner of

Indian Affairs, in a letter to the Secretary, recommended the issue of scrip *as the most practicable method of disposing of the half-breed claims* and enclosed a form of certificate which was approved by the Secretary." (Italics our own.)

The treaty itself, then, conferred upon the executive department the authority to determine the method of transferring the title to the half-breeds. The Department, in the exercise of this authority, provided that scrip should issue and that it should not be assignable. The treaty, therefore, is to be construed just as though it contained the language prohibiting the assignment of the scrip.

We contend that there is no substantial difference in the two cases; and that the attempt to place one construction upon the act, and another upon the treaty, simply because in one the legislature prescribed the method of transferring the title, and in the other the executive department, in pursuance of authority conferred upon it, did so, is to make a distinction without a difference, and invokes a forced, unnatural and unreasonable rule of construction.

It is evident from the language of the circular authorizing the issue of the scrip, and from the language of the scrip itself, that the scrip was provided for merely for the purpose of "identifying" the half-breeds and as a mere method of convenience to be used in transferring the title from the

government to the half-breeds, and not for the purpose of preventing a conveyance of the land.

The act was passed in July, 1854, and the treaty was negotiated in September, 1854, and they were administered contemporaneously; and the presumption is that the purpose in providing for the issue of scrip was the same in both cases.

In 1832, the government negotiated a treaty with the Potowotomies, 7 St. at Large, 399, and among others granted two sections of land, without specifying where they were located, to Petchico.

Article 3 of the treaty provided:

> "The foregoing reservations shall be selected, *under the direction of the President of the United States, after the lands shall have been surveyed,* and the boundaries to correspond with the public surveys." (Italics our own.)

Petchico conveyed his lands before they were surveyed and before any selection had been made, dscribing them in the deed merely as the lands he was entitled to under the treaty.

After the survey and selection, the plaintiff

> "Took a deed from Petchico's heirs, dated in 1855, on the assumption that their ancestor's deed was void, he having died in 1833, *before the lands were surveyed or the reserved sections selected.* And on the trial below, the court was asked to instruct the jury 'that Petchico held no interest under the treaty in the lands in question, up to the time of his death, that was assignable, he having *died before the*

location of the land, and before the patents issued.'" (Italics our own.)

The lower court refused to give the instruction, and held that Petchico had a perfect right to sell his land, *before the location,* and that the title vested in his grantees when the selection was made.

The decision was affirmed by the Supreme Court in the case of Doe vs. Wilson, *supra,* and in the course of the decision the court says:

> "Although the government alone can purchase lands from an Indian nation, it does not follow, that when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest. The Indian title is property, and alienable unless the treaty had prohibited its sale."

The doctrine laid down in the above case was reaffirmed in Crews vs. Burcham, *supra.* In the latter case the court says:

> "It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the President, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is absolute and imperative, and founded upon a valuable and meritorious consideration. The land reserved constituted a part of the compensation received by the Potowotomies for the relinquishment of their right of occupancy to the government. The agreement was one,

which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding, because entered into by the government. *The equitable right, therefore, to the lands in the grantee of Besion, when selected, was perfect;* and the only objection of any plausibility is the technical one as to the vesting of the legal title." (Italics our own.)

It will be noticed that this treaty, like the treaty with the Chippewa half-breeds, contained the provision that the lands should be selected "under the direction of the President." But we have already discussed this point and will not repeat the argument.

In addition, the latter treaty provided that the selections should be made "after the lands shall have been surveyed," and one of the points raised in Doe vs. Wilson, *supra,* was, that the deed was void because "Petchico held no interest under the treaty in the lands in question, up to the time of his death that was assignable, he having died *before the location of the land."* (Italics our own.)

Evidently, this argument did not commend itself to the court.

The case of Jones vs. Meehan, *supra,* involved the construction of Art. 9 of the treaty of the Red Lake and Pembina bands of Chippewa Indians. This article provided:

"Upon the urgent request of the Indians,

parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of Thief River for the Chief Moose Dung."

Some years later the chief died, and his only surviving heir, Moose Dung the younger, in 1891, made a lease of a part of the premises selected by his father to the plaintiff.

In 1894, he made a lease of the entire premises to the defendants, and the latter, assuming that the Indian had received no such title under the treaty as would enable him to make a conveyance in his own right, obtained the passage of a joint resolution authorizing the Secretary, in his discretion, to approve the lease to the defendants. The Secretary, after making certain changes in the terms of the lease, approved it.

Thereupon, the plaintiffs, commenced an action against the defendants to quiet title, claiming that Moose Dung was vested with a fee simple title by the terms of the treaty and that the lease made to them was valid.

The question to be decided is stated by the court to be as follows:

"The fundamental question in the case is, what was the nature of the title which the elder Chief Moose Dung took under the treaty of October 2, 1863, between the United States and the Red Lake and Pembina bands of Chippewa Indians? Was it a mere right of occupancy, with no power to convey the land except to the United States, or by their con-

sent? Or was it substantially a title in fee simple with full power of alienation?"

The circuit court held that the reservation in the treaty to the elder Moose Dung was in the nature of a grant of title to him, burdened with no restriction or condition, and that the lease to the defendants, though approved by the Secretary under the act of congress, was of no validity as against the prior lease made to the plaintiffs. This decision was affirmed by the Supreme Court.

It will be noticed that the terms of the grant, "there shall be *set apart,*" are not as strong as those generally used where a fee simple title is intended to be conveyed. In such cases the provision nearly always is, there is hereby "granted" or "sold" or "conveyed," or "aliened." The term "set apart for the *use* of," is the one most frequently used in Indian treaties where a mere right of occupancy is granted; and, undoubtedly, if the words "use of" had been added to the terms of the grant in this case, the Supreme Court would have decided the other way. But because of the omission of this word, and because there was no language in the treaty affirmatively prohibiting a conveyance of the land, the court held that a fee simple title was conferred with full power of alienation.

The court in this case reviews the decisions upon this question of alienation at great length and sums them up as follows:

"The clear result of this series of deci-

sions is that when the United States, in a treaty with an Indian tribe, and as a part of the consideration of the cession by the tribe of a tract of country to the United States, make a reservation to a Chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of congress, have expressly or impliedly prohibited or restricted its alienation."

In his brief in the court below, counsel attempts to make a distinction between the cases of Crews vs. Burcham, *supra*, and Jones vs. Meehan, *supra*, on the one hand, and the case at bar on the other. This alleged distinction is based on what is claimed to be a difference between the terms of the grant in the Act of 1854, and the terms of the grant in those treaties.

According to counsel, in his reply brief in the court below, page 15, the conditions which must exist in order to enable an Indian to convey lands are clearly set forth in the following language of the Supreme Court, in the case of Jones vs. Meehan, supra:

"The clear result of this series of decisions is that when the United States, in a

treaty with an Indian tribe, and as a part of the consideration for the cession of the tribe of a tract of country to the United States, make a reservation to a Chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed or located in the future, the treaty itself converts the reserved sections into individual property."

The Supreme Court in this case did *not,* as counsel assumes, decide that under no other circumstances than those mentioned could an Indian convey his lands. It had been contended that by the terms of this treaty under consideration the Indian could not convey, and the court simply decided that, when the things concurred, which they mentioned, the Indian *could* convey, and did not declare that there were no other possible conditions under which he could convey.

But be this as it may, we propose to show that, in all substantial respects, the Sioux half-breeds came fully within the conditions which counsel himself claims must exist, and that there is no fundamental difference between the treaty negotiated with them and the class of treaties referred to in the above decision.

In those treaties the government had entered into negotiations with the Indians for the surrender of their reservation. In the case of the Sioux half-breeds, the government entered into negotiations for the surrender of the Lake Pepin reservation.

In those treaties, as a consideration for the cession to the United States, a specified number of sections of land were granted to the members of the tribe. In the case of the Sioux half-breeds, as a *consideration* for the cession to the United States, an acreage equal to his interest in the reservation was granted to each half-breed.

In those treaties, the particular lands the Indian was to receive were not pointed out by the treaty. In the case of the Sioux half-breeds, the same was true and they were allowed to select lands out of the public domain.

In the cases arising under those treaties, the Indians were allowed to convey, although at the time of the conveyance they did not know what lands they were conveying and in some of the cases the lands had not even been surveyed.

The only possible distinction between the two, even in matter of detail, is that in the case of the treaties referred to the number of acres granted was specified in the treaty, while in the case of the Sioux half-breeds, by the second section of the act, this was referred to the executive department to be determined as a matter of computation after the number of half-breeds had been ascertained.

But counsel would hardly contend that this is such a distinguishing feature as to make the one estate alienable and the other not, especially as it was definitely ascertained and determined by the Department, before any of these half-breeds agreed to convey their lands, that each one was entitled to 480 acres.

This brings these Sioux half-breeds, then, within every condition mentioned by the Supreme Court in the case cited above.

Not only does the Act of 1854 meet every requirement mentioned by the court, but it contains certain additional privileges which none of those treaties referred to contain.

The Sioux half-breeds were allowed to select their own lands. The lands in the treaties referred to were required to be selected "Under the direction of the President." The Sioux half-breeds were allowed to locate on unsurveyed lands. The lands in the treaties referred to were to be selected "after the lands had been surveyed."

Do these additional privileges indicate an intention to limit and restrict the nature of the estate granted? Or, do they not rather indicate an intention to enlarge rather than to restrict the estate, and do they not indicate that congress had a greater degree of confidence in the ability of these half-breeds to take care of themselves than in ordinary cases?

Now, what is there in the Act of 1854, when compared with these treaties, to indicate that the government intended to place restrictions upon the Sioux half-breeds, and left the Chippewas and Potowotomies free from burdens and limitations? The Sioux half-breeds were permitted to take lands anywhere in the United States. Both the Chippewas and the Potowotomies were confined within comparatively narrow limits. The Sioux half-breeds were permitted to take unsurveyed lands.

The others were not permitted to make their selections until after the lands had been surveyed.

We ask the court, in all earnestness, carefully to read the Act of 1854, and the Chippewa and Potowotomie treaties, and then forgetting, so far as possible, the arguments of counsel both for plaintiffs and defendants, and applying the ordinary rules of construction and sound common sense, to say whether there is any support in reason for the contention that restriction of the right of alienation was intended in the one case and not in the other.

But there is another consideration suggested by these decisions in the Chippewa and Potowotomie cases.

In the light of these cases what becomes of counsel's theory of guardianship? It will be remembered that the only reason counsel assigned for his construction that the prohibitory clause of the act was meant to prevent the sale of the land, was that congress regarded the half-breed as incompetent to take care of his own affairs.

There is nothing in the language of the act itself, as there is in hundreds of the Indian treaties, to convey the idea of incompetency; and counsel's whole argument on this point is based on the *general* policy of the government in dealing with Indians.

In other words, he asks the court to take judicial notice of the incompetency of these half-breeds, whether the language of the act conveys that idea or not.

If this is the rule of construction to be applied in such cases, why was it not adopted by the court in the Chippewa and Potowotomie cases? There was no positive statement in either of these treaties that the Indian *should be allowed to sell his land;* there was simply an absence of restrictions on the right to sell.

But, if counsel's theory is right, why did the courts in those cases not say: This language has been used in reference to Indians; Indians are not competent, and we will, therefore, assume that the government has intended to treat them as such, and will not permit them to convey.

The government did not treat the Chippewa half-breeds as incompetents. It did not treat the full blood Potowotomies as incompetent; it did not treat the full blood Wyandotts as incompetent, for, as to part of them, it was provided, that the "patents shall contain an absolute and unconditional grant in fee simple." 10 St. 1161.

Now, if the government regarded the Chippewa half-breeds as being capable of disposing of their lands, what right has counsel to ask this court to *assume* that the Sioux half-breeds are incompetent; especially as counsel himself has furnished us with a witness who assures us that many of them "were as intelligent as their white brethren."

Again, if the government permitted the full blood Potowotomie and Wyandott Indians to dispose of their lands, without restrictions or limitations, upon what theory is this court to be asked to

indulge the presumption that these Sioux half-breeds, "many of whom are citizens of Minnesota and adjoining states, and have filled offices of honor and trust," were in need of guardianship and protection.

And, finally, we again ask, if these half-breeds needed protection the instant before the location of their scrip, why were they not just as much in need of it the instant after?

If the Secretary and counsel had taken the position that congress had intended to *perpetually* prohibit the conveyance of these lands, the argument would at least possess the merit of consistency and not fall by its own weight.

But to seriously contend that an intelligent body of men deliberately contemplated and provided that these poor, witless half-breeds should be utterly incapable of taking care of their own interests up to a certain day, and that they should then be instantly converted into intelligent beings, is a proposition that staggers human comprehension and an argument that reduces itself to an absurdity.

We desire now to call the attention of the court to another consideration which bears out our contention in regard to the prohibitory clause of this act. Counsel contends that the purpose of the prohibitory clause of this act was to prevent the conveyance of land before location of the scrip. If it can be shown that this alleged purpose was not accomplished; if it can be shown that the alleged remedy adopted was not calculated to accom-

plish any such result; if it can be shown that congress, in the exercise of ordinary intelligence, must have known that this remedy would fail to bring about such a result; and, finally, if it can be shown that there was a perfectly natural, apparent and *effective* way by which congress could have prevented the conveyance of land before location of the scrip,—if these things can be shown, then the theory of counsel stands discredited and must be rejected; for the courts will never assume that the legislature has intended to accomplish a particular purpose, and has adopted a remedy that is utterly ineffectual to bring it about.

In support of these contentions we lay down two propositions:

1. If the purpose of the law was to prevent conveyances of the land, then for a period of thirty-five years, from the passage of the Act in 1854, to the rendering of Secretary Vilas' decision in 1889, it utterly failed to accomplish this purpose, for, during this entire period, this scrip was used in identically the same manner as it was in the case of Eaton and Stram.

2. Although this law, under the Secretary's view of it, was constantly violated, the records of the land department disclose the fact, that this alleged remedy never, *in a single instance,* for this entire period of thirty-five years, operated to prevent a conveyance of land, until it became effective in 1889, in the case of Hyde vs. Eaton.

Now, what are the proofs that this scrip has been customarily handled in this way?

It appears from a printed brief of S. S. Burdett, which was used on the reargument before Secretary Noble, in the Hyde case, and which brief is on file in the department, that in his order for reargument the Secretary directed that an examination of the records be made to ascertain what the practice had been relative to the handling of this scrip. We shall attach that portion of the brief to our brief as an appendix and the court can give it such consideration as it is entitled to. Anything that was officially brought before the Secretary, when this case was being heard by him, is proper to be considered by this court, for this case is practically a review of his action.

This investigation revealed the fact that this scrip had been used in nearly every state and territory in the west, from Michigan to California.

It will hardly be presumed that these half-breeds, who did not sever their tribal relations until 1887, scattered all over this vast territory and took these lands in person.

This investigation also revealed the fact that hundreds of pieces of this scrip had been used by attorneys, and it is a well known fact, that in every land office in Minnesota, there are hundreds of pieces of this scrip that have been used by attorneys in fact.

The following decisions of the courts show that this scrip has been handled in just this way

from the latter part of the fifties down to the decision in the Eaton case, viz:

Gilbert vs. Thopson, 14 Minn., 414.
Myrick vs. Thopson, 20 Minn., 184.
Courselle vs. Weyerhauser, 69 Minn., 328.
Allen vs. Merrill, 8 L. D., 207.
Case of Walter Bourke, 12 L. D., 106.

This practice has been so long continued, so open and notorious that the courts have taken judicial notice of the fact.

Judge Moer in his memorandum in this case says:

> "It is probable that of all the scrip issued under the act, three-quarters to four-fifths of it has been handled in exactly the same way as was the particular scrip *in the case at bar.*" Record p. 277, Fol. 829.

The Supreme Court of Minnesota has taken judicial notice of this fact.

In Courselle vs. Weyerhauser, 69 Minn., 331, the court says:

> "In view of the *usual manner* of dealing with this half-breed scrip and the land entered or to be entered with it, *which are matters of common knowledge,* it is evident that the plaintiff intended to and supposed he was disposing of all his interest in the land entered with the scrip, and that he always supposed that he had done so until some undisclosed in-

fluence induced him to assert the contrary after a quarter of a century."

In the case of Felix vs. Patrick, 36 Fed. Rep. 460, the court says:

> "Knowing as we do, *how land scrip passed in the market*, the only fair understanding of the facts as disclosed by the bill is that this scrip was wrongfully obtained from Sophia Felix, and placed on the market, and that defendant seeking scrip wherewith to enter this land found and purchased this."

And the Secretary himself admits that this scrip was habitually handled in this way, for, in the case of Allen vs. Merrill, 217, he says:

> "The scrip, with these blank letters of attorney pinned to it, passes into the market, and is sold and transferred by mere delivery, as freely as a government bond."

The evidences, therefore, are more than abundant to sustain our first proposition, that for thirty-five years, under counsel's construction of the law, the law was constantly, openly and flagrantly violated.

Both counsel and the Secretary admit that this alleged remedy never operated to prevent the transfer of a single piece of land until it was made to perform that service in the case of Hyde vs. Eaton, in 1889.

Counsel, then, asks this court to hold, that

congress deliberately incorporated this prohibitory clause in the act, *for the avowed purpose of preventing conveyances of the land before location of the scrip,* when it is admitted that this alleged remedy was so utterly ineffectual to accomplish this purpose, that in a period of thirty-five years of constant, open and notorious violation of the law, it never operated, in a single instance, to accomplish the result intended.

Is this court going to hold that the congress of 1854 was so lacking in intelligence that it could only propose a remedy that would operate in this way?

But, counsel will reply, legislatures can only propose remedies, they cannot enforce them or guarantee that they will not be violated.

They can, however, propose remedies which are at least *calculated* to accomplish the desired result.

But a moment's thought, by a person of only average intelligence, would have shown that a prohibition against the assignment of scrip would not operate to prevent the conveyance of land. The Secretary himself, on page 217, in the case of Allen vs. Merrill, absolutely and conclusively proves this.

He says that the usual manner of using these powers of attorney has been to file the power authorizing the location in the land office, "not disclosing the existence of the other." He then says, "Nothing, therefore, to challenge the bona fides of the transaction then appears on the surface, nor

any reason why the land office should not recognize it as the fair exercise of the right to do by an attorney what one might lawfully do himself." After the location is made the power to convey is filed in the office of the register of deeds, and thus the conveyance is effected without the knowledge of the land officials.

The Secretary is at pains to inform us that it was the easiest thing in the world to defeat the purpose of this law. All one had to do was to obtain two powers of attorney, one to locate the scrip, the other to convey the land, and file one in the land office, *"not disclosing the existence of the other."* Then when the title had passed to the scripee under the location, the other power of attorney could be filed in the office of the register of deeds, and the conveyance of the land effected. And the Secretary informs us that there was no way to prevent this, for, when the power to locate is filed, *"nothing to challenge the bona fides of the transaction then appears on the surface."*

Now, is it to be assumed that a scheme that could be so easily worked as this, that was so manifest and transparent that it was seized upon and utilized by the general public before the ink had fairly dried upon the certificates of scrip that were issued to these half-breeds, never occurred to a single member of the congress of 1854? In reply to this counsel will doubtless say, is a law to be held invalid because it is violated? Can the legislative branch of the government prevent infractions of the law?

Legislatures cannot compel men to be virtuous, to think rightly, or prevent them from committing crimes. But there are certain legal effects and results over which legislatures have the absolute control.

We have cited numerous Indian treaties where it was provided that the Indian should never "sell his land except to the United States."

Is there any possible way in which such a provision could be violated? It might be *attempted* but it could not be *accomplished.* Again, the construction which we place on this prohibitory clause of the act, furnishes another illustration of a provision which it is absolutely impossible to defeat or evade. We say it was for the purpose of permitting the government to issue the title direct to the scripee.

There is no way to defeat this provision. If a scripee should give an assignment of the scrip itself the government would refuse to issue the title to the assignee. If a piece of scrip were stolen and a power of attorney to locate forged, the government would still issue the title to the scripee.

If congress had intended to prevent the conveyance of land before location of the scrip, there was a way in which that purpose could have been effectively accomplished. Suppose the prohibitory clause of the act, instead of reading as it does had read as follows:

Provided, however, that no transfer or conveyances of said lands, prior to the location of the scrip shall be valid and every scripee shall furnish

sworn proof that no such conveyances have been made, before the title shall issue to him?" If the law had read in this way no one would have dealt or have attempted to deal, in these lands or in this scrip. Even if there could be means devised to evade such a provision, prudent business men would not take advantage of it, for they would not risk their money in the purchase of lands where the law plainly informs them that the person with whom they would have to deal has no interest in the land which he can dispose of.

We contend that counsel's construction of the prohibitory clause of the act must, therefore, be rejected. For, upon the Secretary's own showing, the alleged remedy was not even calculated to accomplish the results claimed for it by counsel, and there was another and more natural remedy that would have accomplished such result. Such a construction is an indictment of the intelligence of congress, and the courts will not adopt an interpretation that leads to such absurd results.

In the first part of this brief, we had occasion to refer to the fact that the misapprehension of the Secretary, as to the nature and purpose of the Act of 1854, grew out of the assumption that its purpose was the same as that of the homestead and preemption acts. And, as bearing out our contention that he had misapprehended the purport of the law, we called attention to the fact that he had held, that the improvements to be placed upon unsurveyed land must be made for the personal use and benefit of the scripee, and that the land must be

taken for his personal use and benefit, and we showed that this position was untenable, for the reason that if congress had intended that the scripee should make the improvements for his own personal use, and that he should take the land for his own personal use, the act itself would have made these requirements, the same as the homestead and pre-emption acts did.

In our judgment, the construction which the Secretary placed upon the prohibitory clause of this act, that it was intended to prohibit and prevent agreements to convey the land, prior to the location of the scrip, is also due to the fact that he confounded the purpose of the Act of 1854, with that of the public land laws in general.

The Department has been so accustomed to administer laws which contain restrictions upon the right of alienation, that it has been very easy, and somewhat natural, for it to jump to the conclusion that every law which was assigned to it to administer contained such restrictions; just as Secretary Vilas did in the Soldiers Additional Homestead cases, and in which conclusions, according to the courts, he was in error.

And so Secretary Vilas, in this case, seems to have assumed that the language of the act, prohibiting assignments of the scrip, was intended to prohibit agreements to convey the land, before the location of the scrip, without stopping to seriously consider whether there were any reasons why such prohibition should be made, or whether the lang-

uage, according to the rules of statutory construction, would bear any such interpretation.

It will be noticed that there is nowhere, in his lengthy opinion, any specific reason given why congress should have prohibited the scripee from agreeing to convey his land, prior to the location of the scrip.

He starts out with it as an assumed and established fact, that the purpose of the act in prohibiting assignments of the scrip was to prevent agreements to convey, and then makes a very logical and conclusive argument to show that as this was the purpose, the execution and delivery of the two powers of attorney operated to defeat the law.

We think that an examination into the practical reasons which required the issue of the scrip, and of all the facts and circumstances surrounding its issue, will show that *the only reason why the act made any reference to scrip at all* was because it was necessary to provide for its issue *as the only means that could be employed to transfer the title to the half-breeds,* under the peculiar circumstances that existed.

The act provided that if the half-breeds would surrender their interest in the reservation the government would convey to each one, in severalty and in fee, an amount of land equal to his proportional part of the reservation, to be selected by the half-breed, out of any part of the public domain.

The statute required no act upon the part of the half-breed, such as residence upon or cultivation of the land, which necessitated any delay in

the transfer of the title from the government to the half-breed. Consequently, if each one of these half-breeds, at the time they met the government's representative and surrendered their interest in the reservation, had then desired to take the land he was entitled to, there was no reason at all why the government should not, then and there, through its agent, have given to each half-breed a deed to his land and closed the whole transaction, in the same way that individuals would have met and effected an exchange of land. If the transaction had been carried out in this way, manifestly, there would have been no necessity for the issue of scrip, and scrip would not have been mentioned in the act.

But there were certain practical difficulties in the way of this method of procedure. Each half-breed was to receive an amount of land equal to his interest in the reservation, and at the time of the pasage of the act it was not known what the amount would be, and so the second section of the act provided that the land officials should ascertain and determine the amount.

As the amount that each half-breed would be entitled to was not known at the time the contract was closed between the government and the half-breeds, and as the title could not, therefore, be conveyed to them at that time, it was necessary to devise some other means of transferring their lands to them.

Scrip, or certificates of title, were issued, therefore, in order to *identify* these half-breeds, so that the land officials in the various districts would

know who was entitled to receive land under the act, and the amount each one was entitled to.

We, contend, therefore, that the sole reason why the provision in regard to scrip was incorporated in the act, was simply to provide a method for transferring the title to the scripees, and that it was not for the purpose of preventing agreements to convey the land.

Another reason urged by counsel, in his reply brief in the court below, why the half-breed was not allowed to convey before the location, but was after the location, is that in the one case he would have something *"tangible"* to convey, "with the value of which he might be supposed to be acquainted in a much greater degree than with that of a mere commercial instrument, which might be parted with improvidently in accordance with his known traits, for a tithe of its value or a drink of whiskey or other similar consideration."

It does not seem reasonable to us that congress, in passing this act, ever took such a fine spun distinction as this into consideration. A person who did not have sense enough to know that a certificate, which called for 480 acres of land, was worth as much as the thing it called for, would not have sense enough to dispose of the land to advantage after he got it. And yet the Secretary and counsel admit the scripee could sell his land immediately after the location.

Counsel, in his brief in the court below, on the same page from which we have quoted, says that

the law contemplated a "personal selection" of the land by the scripee so that he might have knowledge of its value before he parted with it, and that this was the reason congress prohibited him from selling it before the location of the scrip.

But counsel himself admits that a scripee could go to the land office, locate his scrip, sell the land the instant after the location, although the particular piece of land might be hundreds of miles distant, the scripee might never have seen it, or know anything about it.

It is true that in such case the scripee would be selling something "tangible", a specific piece of land; but he would not know any more about its value than if he had never located it.

It will not do for counsel to answer that in such case the scripee would at least have the *opportunity* to ascertain the value of the land before selling it; for his contention is that the purpose of this law was to protect incompetents and where the legislature attempts to protect incompetents it does not stop with giving them the *opportunity* to protect themselves, but positively and affirmatively prohibits them from doing anything which might injure them; in other words, protects them from their own acts. Therefore, if congress, as counsel asserts, had intended to say to these half-breeds, you are just competent enough to sell your lands if you have made a "personal selection" of them and know the value of the specific piece of land, but are not competent enough to dispose of them where you have not done so, it would have specifically provided

that no half-breed should sell his land unless he had made a "personal selection", or until he had examined the land and had become acquainted with its value.

But, as we have seen, by counsel's own admission, it was possible for every one of these half-breeds, *under the law*, to sell his land, without ever having seen it, and without knowing anything about its value. It is evident either that congress never intended to provide that the scripee should not sell his land unless he made a "personal selection" of it, and was acquainted with its value, or that it was sadly in need of someone to advise it how this could be done.

Petchico, in the case of Doe vs. Wilson, *supra*, Besion, in the case of Crews vs. Burcham, *supra*, the twenty-eight half-breeds, in the case of Dole vs. Wilson, *supra*, all conveyed the lands they were entitled to receive, before the lands were selected, or even surveyed, and, consequently, knew nothing about the location or the value of the lands, and yet the courts held the conveyances good.

How does it happen that this new doctrine of "tangibility" was not applied in these cases?

The vital point raised and relied upon in Doe vs. Wilson was that Petchico had no interest in the land that was assignable, *because the land had not yet been located when he sold it.* And the same point was raised in Crews vs. Burcham, but the court held that while it was true "that no title to the *particular lands* in question could vest in the reservee, or in his grantee, *until the location by the*

President, * * * the equitable right to the lands in the grantee of Besion, when selected, is perfect." (Italics our own.)

We contend, therefore, that this "tangible" argument is not supported either by reason or authority.

As to counsel's suggestion that, owing to the Indian's love of "fire water", it would be very easy to obtain his scrip from him for a drink of whiskey, we would suggest in reply that counsel explain to the court why it would be any more difficult to obtain a deed to the land by the same means, after the scrip had been located.

We have never made a very close study of the question as to the effect of whiskey on the American aboriginee, but we do not think it is unreasonable to claim that if the instruments which call for a piece of land could be obtained from him by the use of whiskey, that a deed for the land itself could just as easily be obtained by the same process, after he had received his title to the land.

The Contention of the Defendants that Sioux Half-Breed Scrip Could be Used by Third Persons to Obtain Land for Their Own Use, is Sustained not only by Reason but by the Authorities as well.

The contention of the defendants that Sioux half-breed scrip could be used by third persons to obtain land for their own use, is sustained not only by reason but by the authorities as well.

The Secretary and counsel contend, as we have already seen, that the Act of 1854 contemplated that the scripee must take the land for his own personal use and benefit, and must claim it for his own personal use, and they contend further that the law absolutely prohibited the scripee from entering into any agreement to convey the land, until after the scrip had been located.

Up to the present point, we have confined ourselves to an argument to show that this contention is unreasonable. We now desire to call the attention of the court to some decisions in which it has been held that it is not in violation of the law for a scripee and a third person to enter into an agreement whereby the third person is to make use of the scrip to obtain the title to land for his own use, and in which land the scripee is to have no interest whatever.

In the case of Thompson vs. Myrick, 20 Minn., 184, the plaintiff had been living on a piece of land to which he desired to obtain title. The defendant, Myrick, had possession of certain scrip, as attor-

ney in fact, for the half-breeds, Longie and Roe, who were minors.

Thompson entered into an agreement with Myrick whereby the latter was to turn the scrip over to the former with power of attorney to locate it, coupled with an agreement that *the land should be conveyed to Thompson as soon as the scrip had been located,* and in consideration of the premises Thompson agreed to pay $2800.

The material part of the agreement was as follows:

> "And whereas the said Nathan Myrick has placed the said scrip and the said power of attorney in the hands of the said Benjamin Thompson, with a view to the location thereof for the benefit of the said minors. Now this agreement witnesseth that the said Nathan Myrick, in consideration of the premises, and the sum of one dollar to him in hand paid by the said Benjamin Thompson, party of the second part, agrees with the said party of the second part, that he will, upon the location of said scrip, *secure the title to the land, whereon the same may be located, to be lawfully vested in the said Benjamin Thompson.*" (Italics our own.)

The scrip, powers, and the above agreement were thereupon delivered to Thompson and he located the scrip upon certain lands in the names of the scripees.

After the location, Myrick, instead of securing the title to Thompson, as had been agreed, caused

the half-breeds, who had arrived at their majority, to convey the lands to Myrick's wife.

Thompson, the plaintiff, commenced an action for specific performance. The defendant urged that the agreement was in violation of the Act of 1854, but the court held otherwise, and decided that Thompson was entitled to a conveyance of the lands located under the scrip.

On page 192, the court says:

> "As to the point that the real object of the contract was to accomplish a transfer of the scrip, we see nothing to distinguish this case in any important respect from Gilbert vs. Thompson, 14 Minn., 544."

But counsel will say, that the contract itself recited that the location was to be "for the benefit of said minors." It doesn't make any difference what the contract recited, the question is what was the real effect and purpose of the contract. It was well understood, and the contract itself provided, that Thompson was to have possession of the scrip and powers to locate it; that he was to locate it on lands of his own selection without consulting the half-breeds or their attorney, and that the lands were to be conveyed to Thompson after the location and that the half-breeds were to have no right, title or interest in the lands. The only benefit that the half-breeds were to get out of the location of this scrip was the $2800 which Thompson was to pay for the privilege of using the scrip in the way he did to obtain the title to the land.

What is the difference between this transaction and the transaction between Eaton and Stram?

Thompson had a certain piece of land in mind to which he desired to obtain the title. He went to an agent of certain scripees and agreed to pay $2800 if they would deliver the scrip to him for location and would agree to convey it to him after the location.

Eaton had a piece of land in mind to which he desired to obtain the title. He went to the agent of Stram and agreed to pay $7000 if she would deliver the scrip to him and give a power of attorney to convey the land after it had been located. The only possible distinction between the two cases is that in one a contract to convey the lands was given and in the other a power of attorney. But there is no difference in principle. Neither the half-breeds, nor their agent, in the Thompson case, had any more to say about the location of the scrip or the selection of the lands than Stram did; and in neither case was the half-breed to have any right, title or interest in the lands, after the scrip had been located, and in both cases the agreemnt to convey was made prior to the location of the scrip.

The case was affirmed on appeal to the Supreme Court of the United States, book 25 Lawyers Ed., 324, and, to show that the particular point in regard to the right to convey was considered and decided by the court, we quote from page 326 as follows:

"Holders of such certificates or scrip were

forbidden to transfer the same, and the defendants contended that the real object of the agreement was to effect a transfer of the same; but the State Supreme Court overruled the defense, and referred to one of their former decisions, assigning the reasons for their conclusion that the defense was not well founded." Gilbert vs. Thompson, 14 Minn., 544.

"Since the cause was submitted, the opinion of the court in that case has been carefully examined, and the court here concurs with the state court that the case is applicable to the present case and that the reasons given for the conclusions are satisfactory and conclusive."

In Hope vs. Stone, 10 Minn., 141, (Gil. 114), a Sioux half-breed, Jennie Cratt, had agreed to convey her land prior to the location of the scrip, and after the scrip had been located she and her husband gave a warranty deed in pursuance of the original agreement. In the controversy that afterwards arose, it was contended that the transaction was in violation of the law. But, on page 123, the court says:

> "There would appear to be no illegality in an agreement to convey lands *when title should be acquired, although at the time of executing such agreement the title is in the United States.*" (Italics our own.)

We maintain, therefore, that both reason and the authorities support the contention of the defendants that an agreement to convey land, prior to the location of the scrip, was not in violation of the Act of 1854.

III.

Conceding that the Power of Attorney to Convey the Land Was Void, and that Eaton Obtained no Title to the Land Through the Power of Convey, the Location of the Scrip Was, Nevertheless, Valid, and, if Eaton Did not Obtain Title Through the Power of Attorney, Stram Obtained Title Through the Locations of the Scrip, and the Secretary, Therefore, Erred in Cancelling the Locations and Taking the Title Away from Stram.

The Secretary's interpretation of that portion of the act which prohibits assignments of the scrip is, that its purpose was to absolutely prevent any conveyance of the land the scripee was entitled to, before the location of the scrip.

The Secretary admits that the scripee had a perfect right to transfer his land the instant after the scrip was located, but holds that the scripee had no power to convey, or to make any agreement to convey, until after the actual location of the scrip, and that such a conveyance, under the law, is void and of no effect. And as the Secretary found that Stram had executed a power of attorney to convey the land before the location of the scrip, and that a conveyance of the land had been made to Eaton under this power, he held it to be his duty to cancel the scrip locations and throw the land again open to public entry.

The defendants, on the other hand, say, that if it be conceded that the law prohibited conveyances of the land before the location of the scrip, and that the conveyance to Eaton was, therefore, void, that, consequently, such conveyance vested no title in Eaton, but that the title was still in Stram under the scrip locations, and that the Secretary had neither the right or power to take the title away from Stram, and, therefore, under his own theory of the law, he erred in cancelling the locations.

The scrip in this case was located under power of attorney duly executed by Stram. The land office circulars, to which we have heretofore referred, 1 Lester, L. L. 627, 1 Copp's P. L. L. 721, both provided that this scrip could be located by power of attorney, and Secretary Vilas himself admits that the scrip could be located by power of attorney for, in Allen vs. Merrill, 8 L. D., on page 217, speaking of the power to locate, he says: "Nothing, therefore, to challenge the bona fides of the transaction then appears on the surface, *nor any reason why the land office should not recognize it as the fair exercise of the right to do by an attorney what one might lawfully do himself.*" (Italics our own.)

Here is an explicit recognition by the Secretary of the right to *locate* scrip by power of attorney.

The power of attorney had been duly executed by Stram; it is admitted that she was entitled to

320 acres of land and that the land in question was subject to location under this scrip; the government had received and cancelled the scrip in return for the land taken, and the scripee had not asked to have the locations cancelled. Why, therefore, even under the Secretary's theory of the law, should the locations have been cancelled and the title taken away from Stram?

But, the Secretary says, the law absolutely prohibited conveyances of the land before the location of the scrip; Stram had entered into an agreement to convey the land to Eaton before the scrip was located, and it was necessary to cancel the locations in order to prevent the title from vesting in Eaton.

But if his theory, that a conveyance of the land before location of the scrip was prohibited, is correct, then the instrument of conveyance was null and void and no title was conveyed to Eaton by it, but the title remained in Stram.

This would not be like a case where a party has the *power* to convey land and a conveyance is obtained from him by fraud. Such a conveyance is merely voidable and the conveyance is good until set aside. But, if the contention of the Secretary is right, Stram, before the location, had no *power* to convey; she had no conveyable interest, and, therefore, nothing passed by her instrument of conveyance. In the case of the title obtained by fraud the grantor had the *power* to convey, but the title was not rightfully obtained; but in the case of

Stram, under the Secretary's construction of the law, there was an entire absence of *legal authority,* and she could not invest herself with a power which the law denied to her.

But, counsel for plaintiff says, this is mere quibbling, and that if the Secretary had not interfered and cancelled the location, Stram and Eaton would have succeeded in evading the law and in passing the title to Eaton.

Assuming the Secretary's construction of the law to be correct, we deny that the title to this land would have passed to Eaton if the Secretary had not cancelled the location.

The records of title show that the power of attorney to convey was executed the 25th day of May, 1883; the records further show that the scrip was located on the 16th day of June, 1883. Therefore, it will always and eternally appear, *upon the face of the records,* that the power to convey was executed *before* the scrip was located.

We have then this situation: The records themselves disclose the fact that the conveyance was made three weeks before the location; the Secretary claims that the law absolutely prohibits such a conveyance; from this it follows that a bare inspection of the records would reveal that the conveyance from Stram to Eaton was void and that the latter obtained no title to the land.

The Secretary avows that he cancelled the location *to prevent the title from vesting in Eaton.* But, if his theory of the law is correct, the records

themselves showed that Eaton had no title, and the Secretary's official declaration of that fact was entirely perfunctory and unnecessary.

The courts have time and again decided that if a patent, or other instrument, *shows upon its face,* that it was issued without authority, it is void and of no effect. Upon the same theory, if the records showed that Stram had no authority to make this conveyance, it was void and no title passed to Eaton. If the Secretary had not cancelled the location, and Eaton had attempted to convey the land to a third person, such a conveyance would have vested no title in his grantee, if the Secretary's construction of the law is right; for an examination of the records would have disclosed to the grantee that Stram's attempted conveyance to Eaton was made *before the location,* and the application of the Secretary's theory of the law to these facts would have informed the purchaser that Stram had no power to make such a conveyance; that it was therefore void and that the purchaser could obtain no title from Eaton.

The Secretary bases his right of action in cancelling the location, solely upon the ground that it was necessary to prevent an evasion of the law, to-wit., the conveyance of the land to Eaton. But, if the Secretary's construction of the law was correct, it was already *apparent upon the face of the records,* that by force of law the title had not passed and could not pass to Eaton, and there was no foundation for his action and he was without authority to cancel the location.

On page 100 of his brief, in the court below, counsel for plaintiff says:

> "We are told that a mere *attempt* to evade the law against the assignment of the scrip involves no moral turpitude and that the Indian is not *penalized by reason* of such attempt; and the memoranda of the court below go further and hold that the white man who has not merely attempted but *confessedly succeeded* in evading the clause against the assignment of the scrip is not *penalized* even to the extent of having the location made *for his exclusive use and benefit cancelled.*" (Italics our own.)

But the fallacy of the position both of the Secretary and of counsel for the plaintiff lies in the assumption that Eaton would have "*confessedly succeeded*" in evading the law, unless prevented by the interposition of the Secretary's action cancelling the location.

If it be conceded that the agreement between Stram and Eaton was an attempt to evade the law, and if this design *would have become effective* unless prevented, then, undoubtedly, the Secretary would have been warranted in cancelling the location in order to prevent the *accomplishment* of the design. By inference and implication, the argument of the Secretary and counsel lead to the conclusion that if Eaton and Stram *would not have succeeded* in evading the law, then the Secretary would not have been warranted in cancelling the location, for the only justification they plead for his action is *that they would have succeeded.*

Now, what, according to the Secretary, were Eaton and Stram trying to do? They were trying to convey title to the land *before location of the scrip;* this is the offense complained of.

But, as the fact appeared, *upon the face of the records,* that the conveyance was made *before the location,* and as the Secretary claims that, under the law, such a conveyance is void, all anyone had to do was to apply the law to the facts as they appeared, to see that the conveyance was of no force or effect. If it had no force or effect, then no title passed to Eaton. If no title passed to Eaton, then Stram and Eaton *had not succeeded* in evading the law. If Stram and Eaton had not succeeded in evading the law, then the Secretary was not warranted in cancelling the location; for, under his own admission and that of counsel, his only purpose in cancelling the location was to *prevent* an evasion of the law.

The Secretary attempted to take the title away from Eaton, on the assumption that the title was already, or would be, in Eaton if he did not take it away. But the records showed, under the Secretary's theory of the law, that no title was in Eaton. What the Secretary actually succeeded in doing, if his interpretation of the law is right, was not in taking the title away from Eaton, but in taking it away from Stram.

The law does not concern itself with ineffectual attempts to evade its provisions. It is only acts that either have, or may, become effectual that it lends its aid in correcting. If John Jones forges

the name of John Smith, and in this way attempts to convey the latter's property, the law will intervene, for, unless it does, the attempted fraud may be consummated. But if John Jones, in his own name, attempts to convey the property of John Smith, there is no necessity for the intervention of any court or tribunal for it already appears, upon the face of the records, that the deed is void and that Jones has not accomplished what he attempted. The law, which everyone is presumed to know, informs everyone that the deed of Jones is a nullity. By the same reasoning, if Stram had no *power* to convey the land before location, and if it appears upon the face of the records that she attempted to convey *before location,* she has accomplished no more than Jones did when he attempted to convey the property of Smith. An application of the law to the facts, as they appear on the records, informs everyone that her attempt was futile and that the title is still in herself.

Art. 12 of the treaty with the Senecas, 7 St. at Large, 350, provides:

> "The lands granted by this agreement and convention to the Seneca tribe of Indians, shall *never* be sold or ceded by them, except to the United States."

A conveyance of these lands to third persons by the Senecas would not have vested any title in the grantees, and there would not have been any necessity for a court, or other tribunal, to set the

conveyances aside, because the law would inform every one that the Senecas had no *power* to make the conveyances and that the title was still in themselves, notwithstanding their attempt to convey.

We deny that the Act of 1854 prohibited the scrpiee from entering into an agreement, before the location of the scrip, to convey his land; but we say that even if it did, as the Secretary contends, that such an attempted conveyance would vest no title in the grantee, any more than an attempted conveyance by the Senecas, under the treaty referred to above, would have vested title in their grantee.

It is true that the Senecas were perpetually prohibited from conveying their lands, and that the Secretary only claims that the Sioux half-breeds were temporarily restrained from transferring theirs, but, if they were prohibited at all, they had no more power to convey, during the period for which they were prohibited, than the Senecas did. It would be a question of the *power* to convey in both cases.

Summed up, therefore, the Secretary's position is this: That the Act of 1854 prohibited conveyances of the land until after the location of the scrip; that Stram had attempted to convey the land to Eaton before the location; that it was necessary, therefore, to cancel the locations in order to prevent the title from vesting in Eaton.

In reply to this the defendants say, that if it be conceded, which it is not, that the act prohibited transfers of the land until after the location of the

scrip, then the law informed Eaton and everyone else that the scripee had no power to make such a conveyance; and as it appeared upon the face of the records that the conveyance to Eaton was made before the location of the scrip, the application of the Secretary's theory of the law to the facts would show that Eaton obtained no title by the conveyance, and, consequently, it was not necessary to cancel the locations in order to prevent the title from vesting in Eaton.

As it was not necessary, therefore, to cancel the locations in order to prevent the title from vesting in Eaton, there could be only one other reason why the locations should be cancelled, and that is as a punishment to Stram for what the Secretary conceived to be a violation of the law by her in agreeing to convey the land to Eaton before the scrip was located.

But the Act of 1854 does not provide any penalty for the violation of any of its terms.

In the case of Gilbert vs. Thompson, 14 Minn., on page 416, the court, speaking of an attempt to transfer the scrip, says:

> "Such attempt to transfer would not involve any moral turpitude, nor the breach of any legal duty, as is the case with an attempt to transfer a pre-emption right. It would be simply ineffectual because the scrip is not transferable."

Under the pre-emption act, an agreement to

convey the land before final proof was followed by a forfeiture of the pre-emption right. But neither the Secretary or counsel claims that an agreement to convey the land before location of the scrip is followed by a forfeiture of the scrip, under the Act of 1854. In fact, the records of the Interior Department in this very case, show, that shortly after the decision of Secretary Vilas cancelling the scrip locations, the Department formally offered to return the scrip to Eaton, but he stood upon his rights and refused to accept it; but thereafter it was returned to the heirs of Stram, who had in the meantime died, and was actually located a second time on lands in Wisconsin.

It is apparent from this that the Department did not consider that Stram had forfeited her right to the scrip by agreeing to convey the land to Eaton, because it returned the scrip to Stram's heirs and permitted its relocation.

By the Department's own admission, then, Stram was entitled to a return of the scrip and entitled to relocate it the moment after the Secretary rendered his decision cancelling the original locations.

Why, then, should the locations have been cancelled and the title taken away from Stram? even if it be conceded that Eaton was not entitled to the land?

If Stram had been in the land office the moment the Secretary's decision became effective, she would have been entitled to an immediate return of the scrip, and could have turned around and re-

located it the next instant on the very land from which it had, but a moment before, been cancelled.

It cannot be possible that the law requires any such senseless proceeding as this. No one would be benefitted by it, no public or private purpose would be subserved by it.

Think of the Secretary of the Interior in a case of this kind solemnly announcing: Mr. Scripee, you have committed a grave offense against the law. The statute provides that no agreement to convey the land shall be made until after the scrip has been located. You have made such an agreement, but it is void, and it is necessary for me, therefore, to cancel the locations of the scrip. But the law does not visit any penalty upon its violation, and I, therefore, return your scrip to you and you may relocate it on the land upon which you originally placed it if you see fit to do so.

Such a proceeding as this, cancelling the scrip locations and immediately thereafter permitting its relocation, would be but an idle ceremony, for it would leave both the government and the scripee in exactly the same position they were in before the locations were cancelled.

The very decision of the Secretary in which he cancelled this location, furnishes an illustration of the rule as to when it is necessary, and when not necessary, to cancel a location or filing for an attempt to evade the provisions of law. In the decision in which he cancelled this location he also cancelled Hyde's application for a pre-emption entry on this same land. The ground for his action was,

that Hyde had entered into a *secret* contract with a third person to convey an interest in the land as soon as he should obtain the title. There are two things that distinguish the Hyde transaction from the Stram transaction. In the first place, the agreement between Hyde and the third person was a *secret* one and would never have become a part of the public records. In the second place, such a contract is *corrupt* in the eyes of the law and is punished by a *forfeiture* of the pre-emption right; it is *malum in se.* On the other hand, the Stram contract, conceding that it was prohibited, did not involve a *forfeiture* of the scrip, nor was the act one involving mor al turpitude, it was merely *malum prohibitum.*

There are two reasons why the Hyde application should have been cancelled. First, because Hyde's *attempt* to evade the pre-emption law, by agreeing to convey an interest to a third person, *would have been accomplished* unless prevented by the Secretary's action cancelling his application. Second, the law distinctly enjoins it as a duty upon the land officers to *cancel the pre-emption entry when such a fraud is attempted.* Sec. 2262 of the pre-emption act provides, that the pre-emptor shall make an oath "that he has not, directly or indirectly, made any agreement or contract, with any person, by which the title should inure to the benefit of any person except himself; and if any person taking such oath swears falsely, he shall forfeit the money which he may have paid for such land, and all right and title to the same." The difference in

the two transactions is perfectly manifest. In the case of Stram the alleged attempted evasion of the law could not have become *effective;* second, conceding the act was prohibited, *forfeiture* of the scrip did not follow as a *punishment.* The *test* applied by the Secretary is, has there been an *attempt* to evade the law; the *test* that we apply is, will the attempt *result* in an evasion of the law.

The courts have also held that an attempt to transfer the scrip was not a void and illegal act necessitating action to rectify it, but that it was simply ineffectual.

In Gilbert vs. Thompson, 14 Minn., on page 416, the court says:

> "It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. The title to the scrip would remain in him,and the title to the land acquired by it would vest in him just as though no such attempt had been made. Such attempt to transfer would not involve any moral terpitude, *nor the breach of any legal duty,* as is the case with an attempt to transfer a pre-emption right. It would be simply *ineffectual* because the scrip is not transferable." (Italics our own.)

And in Dole vs. Wilson, 20 Minn., 308, the court says:

> "But as was held with Gilbert vs. Thompson, 14 Minn., 544, the transfer of the certificates would not be illegal, but only *ineffectual* and void, as a transfer of the title to the same."

We contend, therefore, that even if *it* be conceded that the act prohibited conveyances of the land before location of the scrip, that the Secretary, nevertheless erred in cancelling the scrip locations; for if the act did prohibit conveyances of the land before the location of the scrip, then, as it appeared upon the face of the records that the agreement to convey to Eaton was made before the location, the records themselves showed that the conveyance was void and that Eaton obtained no title under it. And as it is admitted that Stram was entitled to 320 acres of land, and it is also admitted that the law did not provide a forfeiture of the scrip, even if her attempt to convey to Eaton was in violation of the act, then, Stram was entitled to the land even if Eaton was not, and the Secretary erred in cancelling the locations.

If the Secretary erred in cancelling the locations, then the title to the land in question remained in Stram, even if it be conceded that it was not in Eaton.

On March 31, 1886, Stram and her husband conveyed the land in question to Eaton by warranty deed. See Record, page 146 et seq. By the terms of this deed the grantors ratified and confirmed all the acts of Eaton and Merritt under the powers of attorney to locate the scrip and sell the land. The deed also conveyed the property outright to Eaton.

The defendants claim that, even if it be conceded that Eaton obtained no title through the conveyance made to him by Merritt, under the power of attorney given to Merritt by Stram to sell the

land, he *nevertheless obtained title* under the conveyance made to him by Stram and her husband in 1886.

Both counsel and the Secretary admit that the scripee had a perfect right to convey her land the instant after the scrip had been located. The deed of March 31, 1886, was made after both the location and adjustment of the scrip. As the title to the land was in Stram, in March, 1886, if it was not already in Eaton, he certainly became vested with the title from that time, even if he had not obtained it sooner under the conveyance made by virtue of the power of attorney from Stram to Merritt.

IV.

THE AUTHORITIES CITED BY PLAINTIFF IN ERROR.

In his brief in the court below, counsel cited a long list of authorities as bearing either directly or indirectly on the issues involved in this action; but Mr. Washburn, in his brief, has made such an exhaustive, and, to our mind, such an entirely satisfactory review of these authorities, that we shall only examine the two cases which counsel claims are decisive of the issues involved in the case at bar.

These cases are, Fee vs. Brown, 162 U. S. 602, Book 40, Lawyers Ed., 1068, and Felix vs. Patrick, 145 U. S. 317, Book 36 Lawyers Ed., 719.

THE CASE OF FEE VS. BROWN.

If this case held that alienation of the land, under Art. 2 of the Chippewa treaty, was prohibited before the scrip had been located, it would undoubtedly be entitled to great consideration in construing the Act of 1854. But it does not, and the decision does not turn upon the construction of the treaty, *but upon an act of congress.* From the statement of the facts made by the court it appears, that one Brown had located a piece of Chippewa scrip, under power of attorney, in Colorado. Under the treaty such scrip could not be located in that state, and a great deal of this scrip had been located beyond the limits permitted by the treaty itself. To remedy this, congress on June 8, 1872, passed an act to permit persons who had located this scrip outside the territory in which it was allowed, to buy the lands located under such scrip at $1.25 per acre.

Brown, learning that the title he had obtained under the scrip was invalid, purchased under the Act of 1872, and patent, *under that act,* was issued to him December 1, 1876. *"This patent,* Fee attacked as void upon its face, and as having been issued without authority of law." Statement made by the court.

Fee had settled upon the land, applied to enter it as a homestead and attacked Brown's title.

But the question before the court was not whether the patent under the scrip location was void, but that issued under the Act of 1872.

The opening sentence of the decision reads:

"This case *turns* upon the proper interpretation of the act of congress of June 8, 1872." (Italics our own.)

Again, on page 611, the court reiterates: "The validity of Brown's title must turn, then, upon the patent issued to him on June 8, 1872."

The only reason why the court had occasion to consider or refer to the treaty was because it was a part of the history leading up to the Act of 1872. Congress had the *power* to pass the Act of 1872 whether the locations of the scrip in Colorado were valid or invalid; and if they did pass such an act and Brown had taken advantage of it and purchased under it, his title was good even though it be conceded that his use of the scrip was invalid. If this be so, why was it necessary to consider the treaty? There was another point in the case that would have affected the decision even if it had been squarely decided upon the construction of the treaty itself, and that was, that it was conceded there was no power, even in the half-breed in person, to locate the scrip in Colorado.

It is true that Justice Brown uses some language about its being a device to evade the provisions against the assignment of the scrip, but this language occurs in that portion of the opinion containing a historical statement of the facts leading up to the Act of 1872. The very way in which the language is used shows that the position is assumed. In fact, on page 607, after stating that the scrip could in nowise inure to the benefit of any other

person or persons whatsoever, the court says: *"This seems to be conceded in this case."* If both parties to the suit *were agreed on this point,* it must have been some other point that was in dispute. Parties do not ordinarily go into courts to fight over matters they are already agreed on; and points which are agreed on are not very carefully presented to the court.

We think it appears on the face of the decision that the language in reference to the scrip is pure dictum.

We have already called the attention of the court to Hartman vs. Warren, 19 L. D., *supra;* Hartman vs. Warren, 76 Fed. Rep., *supra;* and Dole vs. Wilson, 20 Minn., *supra,* construing this same treaty. In these cases the point was *squarely raised* that the powers of attorney to locate and sell were a device to evade the provisions of the law; but the courts held the conveyances valid.

THE CASE OF FELIX VS. PATRICK.

The facts in this case were, that someone, unknown, had, *by fraudulent practices,* obtained a piece of scrip and a quit claim deed signed in blank, from Felix, and the scrip and deed came into the hands of the defendant, Patrick, who located the scrip on land in the city of Omaha, and then caused the blank quit claim deed to be filled out and filed. In 1869 congress passed an act confirming the title to the land in Patrick. About twenty-five years after the scrip had been located, the heirs of the half-breed, Felix, commenced this action against Patrick. *The bill alleged that the scrip had been ob-*

tained from Felix by fraud; that no consideration whatever had been paid to her for the scrip; that, by reason of the manner in which the scrip had been obtained from her, no title passed, either to the scrip or to the land taken thereunder. The bill further alleged that the act of 1869 was unconstitutional and void, that Patrick held the title in trust for the plaintiffs and asked the court to so decree. The case arose on a demurrer to the bill; consequently, all the allegations of the bill are admitted.

Counsel claims that the decision in this case "is decisive" of the case at bar. A very cursory view of the facts in the case will show first, that no such questions were raised in that case as in the case at bar, and, second, that the decision, as made, *did not, and could not,* have turned on such questions, even if they had been raised.

Now, what is the main point in the case at bar? It is, whether the volutary agreement to convey the land, made between Stram and Eaton, was void, in law, and whether the Secretary was, for this reason, warranted in cancelling the scrip location. But the plaintiff's in the Felix case raised no such point as this. They did not claim that the *original location of the scrip was void* because there was an agreement between the scripee and Patrick to convey the land. They were in court claiming that Felix had not voluntarily parted with the scrip at all; that it had been obtained from her by Patrick's predecessor *by fraud and without consideration,* and, therefore, that Patrick held the title in trust for Felix.

The vital distinction betwen the two cases is, that in one the point was, that Stram and Eaton had voluntarily entered into an arrangement to convey the land, prior to the location of the scrip, which the Secretary held was a *violation of the law.* Necessarily, therefore, the provisions of the *law* in this case were the subject of inquiry. The point in the Felix case, however, was, not that the Act of 1854, had been violated, but that a fraud had been committed against Felix and that *her rights had been violated.* This question of fact was, therefore, the subject of inquiry in the Felix case, and its investigation did not involve a consideration of the provisions of the law at all, for a fraud could have been committed against Felix whether the law did, or did not, permit agreements to convey the land.

If the facts in the Felix case had been that Felix had voluntarily entered into an agreement with Patrick's predecessor to convey the land she was entitled to, and in pursuance of such agreement she had delivered the scrip and a blank quit claim deed to effect the conveyance after location of the scrip, then, undoubtedly, the decision in that case would be decisive of the case at bar.

But the plaintiffs denied that Felix had voluntarily parted with either the scrip or deed, and alleged that they had been obtained from her by fraudulent means.

It is manifest from this that the plaintiffs in the Felix case were not attacking Patrick's title because of the manner in which the scrip and quit

claim deed were *used,* but because of the fraudulent manner in which they were *obtained.*

But the particular vice complained of in the Stram case is the manner in which the scrip was *used.* Consequently, it is apparent that entirely different questions were presented for consideration in the two cases.

But, aside from these considerations, a careful reading of the case will show, that the court did not *pretend* to consider the nature or purpose of the Act of 1854, and that whatever language is used in the case in regard to such use of the scrip being illegal is purely incidental, as is shown by the fact that the court *assumes* it would be illegal without argument or discussion.

This case was first decided by Justices Brewer and Dundy sitting as a circuit court, and is reported in 36 Fed. Rep. 457. Justice Brewer wrote a long and elaborate opinion. The case itself shows that there was an unusual array of able counsel on both sides. Under such circumstances and considering the fact that the property in controversy was worth a million dollars, every possible point that could have any bearing on the case would be elaborately discussed by counsel and carefully considered by so able a jurist as Justice Brewer. And yet, there is not a word in this decision that would indicate that any such questions were presented to the court as are involved in the case at bar. The Act of 1854 is only mentioned in the most incidental way and Justice Brewer, in the course of the decision, says, that the principal points raised by counsel were the

validity of the Act of Congress of 1869, confirming the title in Patrick, and the question of laches, and the decision is based squarely on the latter question.

The decision in the Supreme Court was also decided on the question of laches, for in the second paragraph of the opinion the court says: "The most important question in this case, however, the question upon which the result must ultimately depend, is that of laches."

Justice Brown, who wrote the opinion in the case of Fee vs. Brown, *supra*, also wrote the opinion in Felix vs. Patrick, and used almost the identical language in regard to the Chippewa half-breed scrip, in the former case, that he does in regard to Sioux half-breed scrip in the latter. We were also informed by the court itself, in the case of Fee vs. Brown, that all parties conceded that the manner in which the scrip was used to acquire the land was illegal. If that is so the question could hardly have been discussed.

This, no doubt, also accounts for the use of the language in regard to the illegal handling of the scrip in the Felix case. The question was not in issue; it was not presented or argued to the court, and Justice Brown *assumed* such use of the scrip to be illegal from the bare fact that it was not disputed by either of the parties to the suit.

If our views in regard to the effect of the decisions, in the cases of Fee vs. Brown and Felix vs. Patrick, are correct, then the plaintiff is left without any authorities to support its contention, for

these are the only two cases upon which counsel relies, as being decisive of all the issues in the case at bar.

V.

The Question of the Right of Third Parties to Use Scrip to Obtain Land for Their own use Had been Res Adjudicata in the Land Department for Twenty Years at the time Eaton Entered into the Agreement with Stram.

The defendants deny that the agreement between Stram and Eaton violated either the letter or the spirit of the law, but they contend that even if it did there were two things which fully justified them in entering into the agreement, and that the Secretary, therefore, erred in cancelling the locations. These two things were:

1. That more than twenty years before the transaction between Stram and Eaton, the land department had held that third persons might use Sioux half-breed scrip for the purpose of acquiring the title to land for their own use and benefit; that this decision had never been overturned or called in question by the Department, until the decision rendered by Secretary Vilas in the case of Hyde vs. Eaton in 1889; that during all of this period the people had a right to rely, and did rely, upon this decision as a correct interpretation of this law; that it had become a rule of property and that it was,

therefore, inequitable and unconscionable to overturn it after such a lapse of time, even though as a matter of law the decision was wrong.

We refer to the decision in the case of Felix vs. Carroll, which was rendered in 1863, and which is printed as Appendix B to this brief.

Counsel contends that the facts in the Felix case are different from the facts in the case at bar, and that it is not, therefore, in point.

On page 112 of his brief, in the court below, he says:

> "It is obvious that he (Secretary) considered that the location was made for the benefit of the half-breed."

If this statement is correct, counsel is undoubtedly right, for the complaint made against the use made of the scrip in the Stram case was that the location was made for the benefit of Eaton; that is that Eaton and not Stram was to receive the land.

The question as to whether or not the Secretary considered that the location was made for the benefit of the half-breed, or for the benefit of a third person, depends upon the facts which were presented to him; and, in order to show that the specific question in this case was whether a location, made for the benefit of a third person, is valid, we quote from the record in this case as it appears in the Department.

> *"In this case the issue was, whether the location was made in the interest of the scripee,*

or of another person, one Patrick, as charged by the contestant. Three witnesses were introduced at the trial whose testimony tended to show that no such person as Felix, the scripee, was known, that no such person was in existence, *and that the real beneiciary was Patrick.* The Register of the local office indorsed on the papers a certificate in the following words:

"The location in the name of Sophia Felix was *not* made by said Sophia Felix in person, but by one Augustus Kountze, of Omaha, for the benefit, as I believe, of M. L. Patrick. The warrant issued to said Felix is not transferable, and as I had never seen such a warrant, I permitted the entry by another party because I was informed by the former register of the Dakota Land Office (Dr. Groff) that such entries had been common under similar circumstances at that office." (Italics our own.)

This is the same location of scrip that was referred to in the case of Felix vs. Patrick, *supra,* and it will be remembered that it appeared in that case that some one, unknown, had, by fraudulent means, obtained possession of an application to locate the scrip and a blank quit claim deed, both signed by Felix, and that Patrick, desiring to obtain the title to a particular piece of land, had obtained possession of the blank application and quit claim deed, caused the scrip to be located in the name of Felix, and then caused the land to be conveyed to himself by means of the blank quit claim deed.

It is perfectly apparent, therefore, from the facts in the case, that the Secretary did not think that the location was made for the benefit of Felix.

But the language of the decision itself shows that the Secretary did not consider that the location was made for the benefit of Felix.

The Commissioner had *decided against the location* on the ground that the location was not made for her benefit.

We quote from the decision itself the ground upon which the Commissioner decided against the location:

> "The location of the scrip, although made in her name, was not made by her in person, nor by her guardian or duly authorized agent for her use and benefit, but by an unauthorized person, *and for the use and benefit of a person having no legal interest therein.*"

The precise question presented to the Secretary for decision, then, was: Is a location of scrip made, not for the benefit of the scripee, but for the benefit of a third person, valid?

The Secretary's answer to this was as follows:

> "As the certificate of location issued in her name, and the patent will issue to her, neither the Register's report or the affidavit of third parties can be admitted to establish the interest in the location."

Here the Secretary emphasizes the fact that the only concern of the Department was, to see that the certificate of location issued to her and that the patent will issue to her.

Counsel picks out sentences here and there in

this decision and, by some fine verbal distinctions and discriminations, attempts to show that this decision does not hold what we claim it does.

It doesn't make very much difference what particular form of words the Secretary used to express his views. The essential question is what did he *decide*, what was the *result* of his action. The Commissioner had held that where a person, other than the scripee, had located, or caused to be located, a piece of scrip on land, the title to which was to inure to the sole benefit of such person, that the location was in violation of the law and could not be allowed.

The Secretary reversed the Commissioner on this holding and allowed the location. On this state of facts it does not require much thought or research to determine what the Secretary decided.

But counsel says, there is a marked distinction between the two cases, because in the Felix case the application to locate was signed by the scripee herself, and in the Stram case the location was made by power of attorney.

This is a mere quibble. Is counsel for plaintiff ready to admit that if Stram had signed the application to locate the scrip and had given Eaton a blank quit claim deed signed by herself, instead of executing powers of attorney to locate the scrip and sell the land, and Eaton had used the deed to convey the land to himself, that the transaction would have been valid?

The whole burden of plaintiff's complaint has been that the execution of the two powers of attor-

ney *was a mere device to permit Eaton to obtain the land.*

But this purpose could have been accomplished just as well by the use of a blank quit claim deed as by a blank power of attorney. If either was a violation of the law, which we deny, the one was as much of an offense as the other.

In order to avoid any confusion as to the effect of the decisions in the cases of Felix vs. Patrick and Felix vs. Carroll, we call attention to the difference in the facts that were presented for consideration in the two cases.

In Felix vs. Patrick the complaint was that the scrip and quit claim deed had been obtained by fraud and without the payment of any consideration.

In Felix vs. Carroll, however, the ground of complaint was that the scrip had been located for the benefit of Patrick, and not for the benefit of Felix.

In Felix vs. Patrick, the plaintiffs did not attack *the original location,* but treated it as genuine and contended that Patrick held the title in trust for them because the scrip and deed had been obtained from their ancestor by fraud.

In Felix vs. Carroll, however, the contestant attacked the *original location* because it had not been made for the benefit of the scripee.

In Felix vs. Patrick, the precise question presented for consideration was the manner in which the scrip and quit claim deed had been *obtained.*

In Felix vs. Carroll, the precise question pre-

sented for consideration was the manner in which the scrip had been *used.*

We contend, therefore, that Felix vs. Patrick is not an authority for the plaintiff and that Felix vs. Carroll, is an authority for the defendants.

Here was a decision, then, rendered by the highest authority in the Department whose duty it was to construe and administer this law, holding that scrip could be used for exactly the same purpose for which Eaton used it.

This decision had stood unquestioned for over twenty years, and Eaton and every one else had a perfect right to rely upon it.

If they could not rely on a decision rendered by the Secretary of the Interior, where could they go to ascertain what their rights were? For what purpose does the Secretary render decisions if not to establish and settle the law for the Department over which he presides.

Any layman or lawyer would be fully justified in concluding that the decision in Felix vs. Carroll held that third persons could use Sioux half-breed scrip for the prpose of acquiring land for their own use and benefit. If this is so, then it was inequitable and unconsciable for the Department to overrule it after it had stood unquestioned for over twenty years and every one had honestly acted upon it, even though the decision, as a pure question of law, was wrong.

The Supreme Court of the United States has, in numerous cases, held that where the officers of the executive branch of the government, have, in the

performance of their duties, construed a law, and such construction has been acted upon for a considerable length of time, that the courts will not overturn it, even though, in the opinion of the court, the construction is wrong.

In Brown vs. United States, 113 U. S., 568, the court says:

> "The appellant asserts that this section applies only to commissioned officers and not to warrant officers, to which latter class Brown belonged."
>
> "*It must be conceded that were the question a new one, the true construction of the section would be open to doubt.* But the findings of the court of claims show that soon after the enactment of the act, the President and the Navy Department construed the section to include warrant as well as commissioned officers, and that they have since that time adhered uniformly to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to great weight in the construction of the law, and in a case of doubt ought to turn the scale."
>
> "In Edwards vs. Darby, 12 Wheat 206, it was said by this court that: 'In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect." This case is cited upon this point with approval in Atkins vs. Disintegating Co., 18 Wall 301, (85 U. S. XXI., 844); Smyth vs. Fiske, 23 Wall., 482, (90 U. S. XXIII., 49); U. S. vs. Pugh, 99 U. S., 265,

(XXV., 332; and in U. S. vs. Moore, 95 U. S., 763, ((XXIV., 589.).

"In the case last mentioned the court said that: 'The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not infrequently they are draftsmen of the laws they are afterwards called upon to interpret.' And in the case of U. S. vs. Pugh, the court said: 'While, therefore, the question,' the construction of the Abandoned and Captured Property Act, 'is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted on by the court of claims and the executive for so long a time.'"

The language in the above case is used with reference to purely administrative officers. Much greater weight, therefore, should attach to the decisions of the Secretary of the Interior, who is vested with quasi judicial powers.

VI.

The Custom of Handling Sioux Half-Breed Scrip from the time It Was Issued in 1857, to the time the Decision of the Secretary in Hyde vs. Eaton Was Rendered in 1889, was Identical in every Particular with the Manner It Was Used by the Defendant Eaton.

The second reason why we claim that the decision in this case should be in favor of the defendants, even if it were conceded that the agreement between Stram and Eaton was in violation of the Act of 1854, is, that the manner in which Eaton used the scrip was the same as had been in vogue from the time the scrip was issued until the Secretary rendered his decision in the case at bar; that the practice was so open and notorious and had been continued for such a length of time, without objection by the Department, that it amounted to a practical construction of the law upon which the people had a right to rely.

We have already pointed out, in a former part of this brief, that for a period of thirty-five years, this scrip had been constantly, habitually and customarily handled in exactly the same way it was by Eaton. In fact, so open and notorious was the practice that Judge Moer in his memorandum, in the case at bar, says that probably three-fourths of it had been used in this way; and so general had this practice become that the Supreme Court of Minnesota in the case of Courselle vs. Weyerhauser, *supra,* has taken judicial notice of it; the Circuit

Court of the United States, in the case of Felix vs. Patrick, *supra,* has taken judicial notice of it, and Secretay Vilas has taken notice of it, for in the case of Allen vs. Merrill, on page 217, he tells us that this scrip was customarily handled in this way.

There are still other evidences that this scrip had been habitually handled in this way.

In the case of Hyde vs. Eaton, both the Register and Receiver joined in an opinion that the scrip could be used in this manner, after a contest specially instituted to test the validity of such use of Sioux half-breed scrip.

In the case of Allen vs. Merrill, the local officers allowed the locations to stand, after a contest in which the same questions were raised as in Hyde vs. Eaton.

In Felix vs. Carroll, the local officers allowed the location, after a contest, as we have seen, in which the precise question presented was, whether a location of scrip for the use and benefit of a person other than the scripee was valid. And the Register of the local office, in that case, tells us that he "was informed by the former Register of the Dakota Land Office (Dr. Groff) that such entries had been common under similar circumstances at that office."

It is evident from the action of these officers, located in three different states in the West, in allowing the locations of this scrip, after contests specially instituted to test the question of the validity of locations made for the use and benefit of persons other than the scripee, that they believed the scrip

was being used in accordance with the customary practice in such cases.

It is also to be remembered, that these officers were located in that portion of the country where the greater part of this scrip was used, and, consequently, had both personal and official knowledge of the manner and custom of its use.

Now, if this practice had prevailed to such an extent, and for such a length of time, that the land officials themselves, throughout the West, had come to regard it, not only as the customary practice, but as right and proper, and in accordance with the provisions of the law, is it any wonder that the people came to the same conclusion and honestly believed that this scrip could be used in this way?

And if the people honestly believed that this scrip could be used in this way, induced to do so by the customary practice which had prevailed for more than twenty-five years, and by the practical recognition of this practice by the land officials themselves in allowing locations of this scrip, where it was located for the use and benefit of persons other than the scripee, is there any rule of law or equity which requires the cancellation of a location of scrip made under such circumstances?

As a matter of fact, no one has been injured by the transaction between Stram and Eaton, even if it is admitted that it was contrary to the statute, except that impalpable and impersonal thing which we call the law.

The scripee has not been injured, for, according to the Register and Receiver, she was fairly dealt

with, was satisfied with her bargain, has never asked to have it set aside, and if the land is taken away from Eaton it will not be restored to her.

The government has not been injured, for it has cancelled its obligation and has received the scrip it was compelled to redeem.

The plaintiff can not complain, for it has admitted on the record that it purchased this land with full knowledge of the claimed rights of the defendants.

And now, after a lapse of more than forty years since the passage of this law; after more than a quarter of a century's recognition of this custom by the Department, the only tribunal appointed to administer and construe this law; after this defendant, relying upon the recognition of this custom, had purchased this scrip and parted with over seven thousand dollars of his money, with no thought that he was violating the law, and the violation, if violation at all, one, as the courts tell us, involving no moral turpitude,—after all this, the plaintiff comes into a court of equity and asks that exact, literal and mathematical justice, that most merciless of all things in the universe, be meted out to this defendant.

To what end?

To punish a fraud perpetrated upon this "poor, unlettered half-breed," and restore her property to her?

No, for it is admitted she was fairly dealt with, was satisfied with the transaction, and ratified and

confirmed it for a consideration after the adjustment of the scrip.

To right a wrong committed against the government?

No, for it received the scrip it had issued in return for the land it gave.

To protect the plaintiff from injury? No, for it admits that it has not been prejudiced, and if the land is restored to Eaton the government will return to plaintiff's grantor what it received from him.

To furnish a rule of construction for the future administration of the law?

No, for the law has served its purpose, is practically at an end as a living piece of legislation, almost the last piece of scrip has been located, and it is but little more than a memory on the statute books.

With no public policy to be subserved, then, with no private wrongs to be corrected, with no future interests to be guarded or protected, the plaintiff, nevertheless, comes into a court of equity and asks that the technical rules of the law be applied with literal and arithmetical accuracy, *because it is the law.*

But the law is not a conscienceless, cold-blooded, abstraction. It is not like a machine or a rule of mathematics that must always, and under all circumstances, work out the same result.

It is a practical science to guide and protect men in their daily affairs, and in the acquirement

and disposition of property. The *certainty* of the law is much more to be desired than its *accuracy*.

If Eaton, relying upon this custom which had been in vogue for more than a quarter of a century, used this scrip in this way, induced to do so because of the recognition of this custom by the only tribunal that was competent to pass upon it, he only did what all reasonably intelligent and honest men had done, and would do, under like circumstances.

And is he now, when this law is about to expire and become a dead letter, when no public or private good is to be subserved, to be punished and deprived of his property, and be made the *sole victim* of this law's entire administration, to the end that a court may declare, *as an abstract proposition*, what the correct construction of the law is?

Why, the law is not an *end*, but an *instrumentality*.

The abstract principles of the law are not maintained as barren idealities, but as practical standards to measure and regulate the rights of men.

Neither is the law administered upon principles of abstract right and mathematical certainty.

If the individual has violated the law, though unwittingly, and the failure to correct the error and apply the law will result in injury to others in particular, or the public in general, then must the individual suffer for the common good of all.

But the courts themselves will violate and defeat the law, where to uphold it will result in no good, and to defeat it will prevent harm and injury.

Did the court in Felix vs. Patrick apply the

inexorable rules of the law to the facts, as the mathematician would apply an algebraic formula to a problem, and let these rules work out their own result; making of itself a mere passionless, insensate, unthinking instrumentality through which to announce the result?

If it had, it would have said to the defendant, Patrick, this scrip and deed were obtained by your predecessor from this half-breed by fraud and without the payment of any compensation; as this was the method in which this scrip and deed were obtained, no title in either passed to the party so obtaining them; as no title passed to the party so obtaining them, no title passed to you; as no title in either scrip or deed passed to you, no title in the land acquired by them could pass to you. But, instead of forging and applying these iron links of logic, the court adopted the equitable rules of justice, common sense and reason. It said to the plaintiff Felix, technically you are entitled to this land. But at the time the instruments, through which it was secured, were obtained from your ancestor, this land was of mere nominal value. Today it is worth a million dollars, made so through no effort of your own.

It may be true as you say that you were not aware of the manner in which this land was obtained until recently, but years have elapsed, rights have grown up, and hundreds have relied upon the settled condition of the title to this land. To administer the law now, *as we find it,* and *as it is,* will result in infinitely more harm than good. The

letter of the law must fail; the principles, purposes and ends for which it was created must be sustained.

Not only is it in harmony with the rules of justice and reason, that where rights have grown up under a long continued and generally adopted practice, that those rights should not be overturned by a stringent application of the rules of law, but this doctrine is recognized by the courts and authorities as well.

Says Black on Interpretation of Laws, at page 216:

> "The best evidence of a contemporary construction of a statute, and of its universal acceptance, is a general usage, pusuant to such construction. Where the statute is of doubtful import on its face, great weight is due to such a usage, *and it will not be disregarded by the courts, unless there are very satisfactory reasons to induce them to such a course of action.* A very good illustration of the effect of usage, in this behalf, is found in an early case in Massachusetts. On the interpretation of certain Colonial laws of that state, giving to freemen the power to "dispose of" their lands, the court said: "Of these statutes a practical construction early and generally obtained that in the power to dispose of lands was included a power to sell and convey the common lands. Large and valuable estates are held in various parts of the commonwealth, the titles to which depend on this construction. Were the court now to decide that this construction is not to be supported, very great mischief would follow. Anl although, if it were now res integra, it might be very difficult to maintain such a

construction, yet at this day the argument *ab inconvenienti* applies with great weight. *We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is that long and continued usage furnishes a contemporary construction which must prevail over the mere technical import of the words.*"

The author then goes on to say:

"The 'usage' which is entitled to be considered in the construction of a statute is such as is practical, general and public. It may be the usage of the courts, in regulating matters of practice and procedure without formal decisions; *of the executive and administrative officers of the government, in the discharge of their duties;* of the legal profession generally, in advising their clients and conducting their business; *of the practical men of the community, in conforming their conduct and their contracts to the generally understood meaning of the law*; or of some or all of these combined. But it must not be merely theoretical or speculative." (Italics our own.)

As the defendant Eaton used this scrip, in common with thousands of others of his fellow citizens, in full reliance upon a custom so long continued and universally indulged in that the practice had come to be generally recognized and accepted as

right and proper, the court should not, at this day, apply the stringent rules of the law to his case, even though it believes that he technically violated the law, unless compelled to do so by some overruling consideration of public policy.

SUMMARY.

We, contend, therefore, that the Secretary erred upon both grounds upon which he cancelled the scrip locations in this case.

His position that the scrip was not properly located and should be cancelled, because the improvements were not made under the personal supervision of the scripee, and for her personal use and benefit, and because the land was not taken for her personal use and benefit, is untenable for the following reasons:

1. Because there is nothing in the act itself which requires the scripee to make the improvements for his own personal use, or to take the land for his own personal use, and such requirements by the Department would be an enlargement of and addition to the terms of the law and, therefore, invalid.

2. These requirements made by the Department as to the improvements to be placed upon unsurveyed lands, and the use to be made of the lands,

are in the nature of conditions precedent to the right to obtain the lands.

We contend that this construction of the law is unreasonable because, if congress had intended to require the performance of any acts as conditions precedent to the right to obtain the lands, the requirements would have been made as to surveyed as well as to unsurveyed lands.

3. Because an examination of the surrounding facts and circumstances and of the early circulars issued by the Department show, that the sole purpose in requiring improvements was to givie notice to prospective settlers that prior rights had attached to the lands.

We contend, also, that the Secretary erred in the construction which he placed upon the prohibitory clause of the act.

He maintains that its purpose was to prevent conveyances, or agreements to convey, prior to the location of the scrip.

If this had been the purpose, congress would have prohibited the conveyance of the *land* instead of prohibiting assignments of the *scrip*.

Furthermore, there were no reasons why congress should have prohibited the scripee from conveying the land, prior to the location of the scrip.

The reason assigned by plaintiff that it was because congress regarded the half-breeds as incompetent to take care of their own affairs is untenable, because, if they were incompetent they were

as much in need of protection after they located their scrip as before, and if congress had so regarded them it would have provided that they should not convey their lands either before or after the location.

This position of the plaintiff is also made untenable by the admission of counsel himself that many of these half-breeds were as intelligent as their white brethren, for it is inconceivable that congress incorporated this prohibitory clause in the act for the purpose of protecting incompetents, and yet made it applicable to competents and incompetent alike.

We contend further, that not only were there no reasons why congress should have prohibited conveyances of the land, but, that under the rules of statutory construction, no such interpretation can be given to the language of the act, even if that were its purpose.

The language of the act, as it stands, interpreted according to the ordinary meaning of the words used, accomplishes the lawful purpose of preventing the scripee from assigning to another the right to demand the title from the government; relieves the Department from the inconvenience and responsibility of determining to whom the scrip belongs when presented for location; avoids the possibility of a double redemption of the scrip by the government, and assures every scripee of the certainty of receiving the title to 480 acres of land, in his own name, no matter what means might be adopted to obtain an assignment of his scrip.

If the law accomplishes this, then it is not within the province of the courts to declare that there was some other and more important object that ought to have been accomplished, for this is a matter that is entirely within the discretion and control of the legislature.

Furthermore, the language of the act prohibiting assignments of the scrip cannot be interpreted as inhibiting conveyances of the land, for the reason that the courts have declared that there is a plain and well recognized distinction between the prohibition of the assignment of a right to land, and a prohibition against the conveyance of the land itself; and have held, as a rule of construction, that the courts will never declare that the legislature has intended to prohibit the conveyance of land, unless it be by the use of language so clear and explicit that there can be no possible doubt as to its meaning.

Again, the construction contended for by the Secretary and counsel is negatived by the fact that the act does not provide for any proof to be made that the scripee has not agreed to convey his land, prior to the location of the scrip.

It is inconceivable that congress should deliberately declare that these half-breeds should not agree to convey their lands until a certain time, and yet should permit them to receive the title to the lands, without requiring any proof whatsoever that no such agreement had been made.

Both the pre-emption and homestead acts prohibited the beneficiary from conveying his lands

until certain things required by those acts had been done, and the acts also required *sworn proof* to be made by homesteaders and pre-emptors that no agreement to convey their lands had been made.

It is only reasonable to assume, therefore, that if congress had any intention to prohibit these half-breeds from agreeing to convey their lands, until after the location of their scrip, that it would also have provided that proof of this fact be made, before issuing the title to them.

For the foregoing reasons we contend that the Secretary misconstrued the law and erred in cancelling the scrip locations.

But, conceding that the manner in which Eaton obtained the title to the land in question was in violation of the provisions of the Act of 1854, we contend, nevertheless, that there are three reasons why the scrip locations should not have been cancelled.

First, if Eaton was not entitled to the land Stram was. Even if it be conceded that Stram's attempt to convey the land to Eaton, prior to the location of the scrip, was in violation of the law, no penalty attached to such an act, and, consequently, Stram was entitled to retain the land if Eaton was not.

Therefore, even under the Secretary's theory of the law, the only thing that would have justified him in cancelling the location was to prevent the title from vesting in Eaton. But the records showed upon their face that Stram's attempt to convey

to Eaton was made before the location of the scrip; consequently, if the Secretary's construction of the law is right, an application of the law to the facts would show that Stram's attempted conveyance to Eaton was utterly ineffectual and that the title still remained in herself. There was, therefore, no warrant for cancelling the locations.

As Stram and her husband conveyed the land to Eaton in 1886, which was after the location and adjustment of the scrip, Eaton obtained the title through this conveyance, even if it be conceded that he did not acquire it by the conveyance under the power of attorney to Merritt.

Second, the Secretary erred in cancelling the locations, even if it be conceded that the use Eaton made of the scrip was in violation of the act, for the reason that the Department had decided in 1863, in the case of Felix vs. Carroll, that third persons could use Sioux half-breed scrip for the purpose of acquiring land for their own use and benefit, and not for the benefit of the scripee.

This decision had stood unquestioned, as the law of the Department, for over twenty years; Eaton and every one else, therefore, had a perfect right to rely on it, and it was inequitable and unconscionable to overturn it after such lapse of time, and after the people generally had acted upon it, even though, as an abstract question of law, the decision was wrong.

Third, the Secretary erred in cancelling the locations, even though it be conceded that Stram and

Eaton violated the law, for the reason that it appears from the records of the Department and the decisions of the courts that Sioux half-breed scrip had been customarily used in the same manner that Stram and Eaton used it, from the time it was issued in 1857, down to the time the decision in this case was rendered in 1889.

It also appears, from the action of the local land officials in the cases of Felix vs. Carroll, Allen vs. Merrill and Hyde vs. Eaton, that these officials not only believed it was the customary practice to handle this scrip in this way, but also believed that it was right and proper under the law to do so.

If this custom had prevailed generally for such a length of time that the people had come to recognize it as right and proper, and the land officials themselves had recognized it, there is no principle of law or equity that requires a court to take this land away from Eaton and his grantees, even though the court believes that he violated the technical provisions of the law, especially as no public or private interest would be subserved by it.

In conclusion, permit us to commend to the court a careful perusal of the concise, cogent and very able memoranda of Judge Moer, found at pages 86 and 275 of the record.

Counsel for plaintiff has dignified it with a large share of his attention, and we believe it will equally repay and merit the earnest consideration of the court.

We also call particular attention to the strong and comprehensive opinion of the Supreme Court of Minnesota, found at page 331 of the Record.

Respectfully submitted,

L. C. HARRIS,

C. A. TOWNE,

Counsel for Defendants in Error, Frank W. Eaton and Margaretha Lonstorf.

APPENDIX A.

Extract from brief of S. S. Burdett used on re-argument before the Secretary in the case of Hyde vs. Eaton:

In view of the request of the Secretary, contained in the order for re-argument of the scrip cases, that among other matters to be presented for consideration shall be "the practice of the Department prevailing relative" to Sioux half-breed scrip "prior to Secretary Vilas' decision in these cases," we exhibited that request to the Commissioner of the General Land Office to obtain his permission to examine the files of all the finally adjusted cases. Such permission was obtained, and thereupon an examination was begun and concluded, conducted by Mr. Frank A. Law, of the firm of Curtis & Burdett, and by Mr. J. W. Le Barnes and M. D. Brainard of the firm of Brainard & Le Barnes.

The examination included all the adjudicated cases (some four thousand in number) that had been finally passed upon, either favorably or adversely, to the scrip locations in the Department, and embraced the following land district:

Minnesota: Faribault (afterwards St. Peter), Henderson (afterwards Red Wing), Duluth, Minneapolis, Winnebago City, (afterwards Chatfield), St. Cloud, Taylor's Falls, Ottertail City, Alexandria,

Oak Lake (afterwards Crookston), and Redwood Falls.

Dakota: Vermillion, Bismarck, Grand Forks, Fargo, Devil's Lake, Aberdeen, Springfield, and Huron.

California: Marysville, San Francisco, Humboldt, Stockton, Visalia, and Los Angeles.

Nebraska: Dakota City, Omaha, and Beatrice.

Wisconsin: Bayfield, Eau Claire, La Crosse, Falls of St. Croix, Menasha, and Stevens Point.

Kansas: Topeka, Humboldt.

Utah: Salt Lake City.

Colorado: Fairplay, Denver, Pueblo, Del Norte, and Lake City.

Nevada: Carson City.

Illinois: Springfield.

Indiana: Indianapolis.

Montana: Bozeman.

New Mexico: Las Cruces.

Michigan: Ionia and Marquette.

Washington: Spokane Falls.

Other locations, but few in numbers, made at the Helena and Miles City offices, Montana; Tucson, Arizona; Devil's Lake, Dakota; North Yakima and Seattle, Washington; Cheyenne, Wyoming; and Garden City, Kansas, are still pending for adjudication, and for this reason were not embraced in the examination.

In the examination so made, especial care was taken to ascertain whether, during the period prior to the decision of Secretary Vilas, any case had

arisen exhibiting like facts to those in the cases at bar, and as to what had been the practice or the rulings of the Department with respect thereto. Such cases were found and will be cited. None were found which sustained the view taken by Mr. Secretary Vilas.

Care was also taken to ascertain whether, during such period, any ruling of the Department had been made adverse to the position advanced by these scrip claimants as to the effect of the adjustment of the locations to the public surveys. No such decision was found; on the contrary, numbers of cases illustrating that phase of the pending cases were discovered, and instances of them will be referred to. In all of them the contention we have maintained is borne out and that of Mr. Secretary Vilas negatived.

I have here some abstracts, which show the result of that examination of cases in the General Land Office. I will read the explanatory note at the head. Synopsis of the result of the examination in the General Land Office of individual Sioux half-breed scrip locations, made at the various land offices of the United States, beginning with the year 1859 and continuing down to the present time, embracing—

First. Locations upon surveyed land, when made either by the scripe in person or by attorneys-in-fact, have proceeded regularly to patent uniformly without objection, save where some one claimed a superior right in the land by virtue of a

prior claim, or where it was shown that at the date of location the scripee had died.

Second. Two classes of personal locations upon unsurveyed lands exist; first, those where the location was made by the scripee in person, without any improvements being shown as a basis of the right to a patent; and, second, locations made by the scripee in person where improvements were shown to have been made prior to the adjustment of the scrip to the lines of the public surveys. These two classes have uniformly passed to patent without objection by the United States or otherwise, as far as the records disclose.

Third: There are also two classes of locations upon unsurveyed lands made by attorneys-in-fact, to-wit, those where no improvements were shown to have been made upon the land prior to the survey or at any other time, and those where improvements were shown to have ben made before the survey and the adjustment of the scrip after survey. These two classes of locations seem to have passed regularly to patent without objection to the time when Commissioner Sparks raised the question in the Stram case that is now under discussion. Hundreds of locations of these various classes have been examined where the patents duly issued, the examination covering locations made at various periods between 1859 and 1885, and in some of them the patents issued as late as 1886 or 1887. In no case has a decision by the Department been found which disputed

the right of the scripee to a patent, either in locations upon unsurveyed or surveyed lands, and whether improvements were or were not shown where the record did not show a superior prior adverse claim. In the examination especial care has been taken to discover, if possible, any decisions of the General Land Office or of the Secretary of the Interior bearing upon this question, and none have been found adverse to the scrip locations. If the question was ever raised against any of the unsurveyed locations, that the improvements were not shown to have been made by the Indian and for his personal use and benefit, it seems to have been resolved as a matter of course in favor of the location, without any formal decision upon the question.

The following cases presenting special features are submitted as suggestive of the uniform practice of the Department in such matters:

INSTANCE OF THE FIRST CLASS.

Hundreds of locations made in the various land offices of Minnesota, Dakota, Nebraska, California, Nevada, Colorado, New Mexico, Wisconsin, and other land offices of the country.

INSTANCES OF THE SECOND CLASS.

Bismarck, Dakota.—R. & R. No. 1, and R. & R. No. 3, Bismarck. Locations by administrator upon unsurveyed land and improvements shown. Duly patented in August and December, 1882.

San Francisco, California.—R. & R. Nos. 107, 115, and 120. Locations upon unsurveyed land, adjusted February 11, 1867, and duly patented August 10, 1867. No improvements hown.

Of the third class the special cases of locations upon unsurveyed lands by attorneys, wherein improvements were shown have already been adverted to. The case of locations upon unsurveyed lands where no improvements whatever were shown, and wherein the original locations upon the unsurveyed tract and the adjustment to the public surveys were made by attorneys, are as follows:

Bayfield District, Wisconsin.—R. & R. Nos. 4 and 5. Locations on unsurveyed lands March 1, 1858; adjustments March 28, 1859, and duly patented.

Marysville, California.—Scrip 38, R. & R. No. 12 and 214, E. R. & R. No. 11. Locations upon unsurveyed lands April 24, 1865, by attorney, and adjusted October 31, 1865. Locations duly patented.

San Francisco, California.—R. & R. No. 71 to 98 inclusive; 28 in all.

All these locations were made upon unsurveyed lands December 24, 1866, and were adjusted to the public surveys February 11, 1867. No improvements whatever were shown.

Wm. S. Chapman acted as attorney for the scripees in all the cases. Patents duly issued August 10, 1867, and were delivered to attorneys of this city who represented the attorneys before the Land Department.

R. & R. 100, 101, 102, 103, 104, 108, 109, 110, 112, 114, 116, 117, 118, 119, 121, 122, 123, 124, 126, 127, 128 and 129.

All these locations were made on unsurveyed land in 1866, by Wm. S. Chapman, as attorney-in-act for the scripees, and were adjusted to the public surveys on February 11, 1867. No improvements whatever were shown. Patents duly issued August 10, 1867, and were delivered to attorneys in this city.

Mr. Mullan. Have you the names of those attorneys?

Mr. Burdett. Yes, sir.

Mr. Mullan. Please give them to the Secretary.

Mr. Burdett. It is quite immaterial. Messrs. Britton & Gray were the attorneys.

The following locations were made at the Indianapolis, Indiana, land office March 5, 1874, by attorneys in fact, upon unsurveyed lands; were adjusted to the public surveys by the said attorneys-in-fact February 8, 1876, and were all patented on March 1, 1877. No evidence of improvements was offered or required.

Scrip 524, D, Lucy A. Wells, R. & R. No. 3. Power of attorney dated May 11, 1871, to George B. Wright. 567 E, Josette Moutre, R. & R. No. 4. Power attorney dated January 23, 1867, to William S. Chapman.

582 E, Philamon Provincial, R. & R. No. 5. Power of attorney May 1, 1869, to T. B. Walker.

565 C, Joseph Moutre, R. & R. No. 6. Power

of attorney to Wm. S. Chapman, January 23, 1867.

416 E, RR. & R. No. 8, Eliza Laframboise. Power of attorney April 7, 1873, to John S. Newman.

398 D., R. & R. No. 9, Anthony Renville. Power of attorney, January 10, 1874, to John S. Newman.

There were also made at the same time in the same way the following locations, which were cancelled for the reasons hereinafter stated:

Scrip 203 C, R. & R. No. 7, Hannah Grignon. Location cancelled April 7, 1877, because it was shown that the scripee died before the power of attorney was given.

65 D. R. & R. No. 10, located by J. B. Bassett. Cancelled April 7, 1877, because a duplicate of the scrip had been previously located and patented.

Scrip 595 D, Amanda Brown, located February 13, 1871, on surveyed land in the Salt Lake City District, Utah, by Robert Nagler as attorney-in-fact under a power of attorney dated January 19, 1867.

There was no affidavit of improvement in this case. On February 13, 1871, the attorney-in-fact made affidavit, saying:

"I have located Sioux half-breed scrip 595 D, issued to the said Amanda Brown for her sole use and benefit, and that the said Amanda Brown is now living, to the best of my belief."

The said attorney-in-fact also filed with the scrip an affidavit of J. F. Smith, dated February 13, 1871, which showed that he (Smith) had surveyed the land for "Robert Nagler, as attorney-in-fact for

Amanda Brown, and that the said tract of land is subject to pre-emption." The attorney-in-fact also filed a plat of the land, which had marked thereon two saloons and another building described as "Nagler's saw-mill."

The scrip was after the survey adjusted to the public surveys, to-wit, on August 28, 1871, and the location was duly patented January 3, 1873.

It is quite evident in this case from the plat that the improvements upon the land belonged to Nagler, the attorney-in-fact.

Scrip 95 E, of Mary Hudson.

The application in this case was signed Mary Larose, formerly Mary Hudson, by her husband, Octave Larose, and the location was allowed on this application March 1, 1864, at the Carson City land office, Nevada, W. S. Chapman presenting it without any authority except said application. Afterwards, on June 2, 1864, Mary (Hudson) Larose and her husband ratified the action of the husband and Chapman and the entry was patented.

Now in reading this sort of thing I desire that there shall be no mistake about it. We want it fixed beyond all controversy that we stand upon the adjudications and the uniform practice of the Department—not a new practice, but a practice of more than thirty years past.

But I will go on a little further.

Scrip 321 D, of Margaret Gohin.

Located September 29, 1883, on unsurveyed land at the Creelsburg (now Devil's Lake), Dakota,

land office, by Calvin S. Uline, as attorney-in-fact, under a power of attorney dated July 12, 1883.

Uline adjusted this location to the public surveys October 11, 1883. The entry was approved for patent February 27, 1885, and patent issued March 16, 1885.

As to evidence of improvements we have the affidavit of Uline dated February 11, 1883, in which he said:

"By virtue of letter of attorney hereto attached, I have, for the purpose of locating Sioux half-breed scrip 321 D for a hundred and sixty acres, made or caused to be made, the following improvements upon the lands described as follows, to-wit: N. W. 1-4 of Sec. 27, Tp. 154, R. 64, according to the Government survey, one frame dwelling house, value $175, size 10x12 ft., and 10 acres of breaking."

Cases in the Humboldt Land Office, Kansas.

412 A, Julia Laframboise. Power of attorney, August 5, 1864, to John J. Barnes.

Scrip located by said Barnes on unsurveyed land May 15, 1868. The name of the scripee only is signed to the application, but it is evidently not the handwriting of said scripee.

J. J. Barnes, the said attorney, died, and on December 9, 1868, A. S. Barnes and James I. Barnes were appointed his administrators by the probate court of Cherokee county, Kansas.

On October 19, 1869, S. J. Barnes, as administrator of J. J. Barnes, deceased, adjusted the scrip to the lines of the public surveys.

On December 22, 1869, the said S. J. Barnes made affidavit before the Register in which he alleged that he was administrator of the said J. J. Barnes, deceased, who was agent for Julia Laframboise, and that the latter was an applicant to purchase the S. E. 1-4 of N. E. 1-4 of Sec. 2, Tp. 35 S., R. 24 E., and that she had made the following improvements on said land prior to May 1, 1867, and had a personal residence on said land by her attorney to the time of his death (November 18, 1868); also by the administrator of said estate up to the present time, having built a house 14 x 16 feet, a stable, and 4 acres fenced and under cultivation.

The affidavits of Joel Brewster and Wm. Higby were also filed, in which they say:

"We know that J. J. Barnes, agent for Julia Laframboise, settled on the land about May 1, 1867, by building a house thereon 14 x 16, one story high, shake roof, 2 doors and 2 windows, built a stable, and plowed and fenced about 4 acres of said land. That said agent lived upon said land and in the said house up to the time of his death, which occurred November 18, 1868 that the administrators has had a continuous residence thereon up to the present time."

On June 9, 1870, the Commissioner suspended this location and informed the Register and Receiver that S. J. Barnes had no authority to locate the scrip, and therefore directed that a proper call be made upon the scripee for her sanction of his action. In compliance with this requirement, on June 1,

1870, the said scripee executed a paper in which she said:

"I do hereby certify that I have given my consent and do acquiesce in the adjustment of my Sioux half-breed scrip 412 A to the following description, to-wit, the S. E. 1-4 of N. E. 1-4 of Sec. 2, Tp. 35 S., R. 24 E., in the district of lands subject to sale at Humboldt, Kansas, containing 40 acres, according to the official plat thereof. I do hereby certify that I have located and caused the same to be occupied up to the present time by my attorney and his administrators, and do hereby request that a patent be granted to me for the same."

Upon the filing of this affidavit the location was approved for patent July 5, 1870, and patent issued July 12, 1870.

This was not a case that was merely passed. It was a case of investigation in the General Land Office, and those facts were developed, and those results were reached, and it is precisely in accord and in order with the whole usage of that office from the first.

Scrip A, R. & R. No. 2, James Renville. Power of attorney to John J. Barnes May 9, 1863. Located by the said J. J. Barnes, May 15, 1868, upon unsurveyed lands. Adjusted October 19, 1869, by S. J. Barnes, administrator of the said J. J. Barnes, to the N. E. 1-4 of Sec. 2, Tp. 35 S., R. 24 E. No improvements whatever were shown. The location was not suspended, but was patented May 12, 1870.

391 C, R. & R. No. 3, James Renville. Power

of attorney May 9, 1863, to John J. Barnes. Located by said Barnes May, 1868, on unsurveyed land. Adjusted October 19, 1869, by S. J. Barnes, administrator of said J. J. Barnes, on the N. 1-2 of S. W. 1-4 of 1, 35 S., 24 E. No improvements whatever were shown. The location was not suspended, but went regularly to patent May 12, 1870.

Scrip 320 D, R. & R. No. 1, of Cecelia Demarais. Power of attorney January 1, 1864, to James W. Henderson.

January 26, 1865, the said attorney-in-fact located the scrip on unsurveyed land and filed his affidavit, where he said:

"I, Cecelia Demarais, by my attorney-in-fact, James W. Henderson, do solemnly swear that I have settled upon and improved the land upon whica I have located Sioux half-breed scrip No. 320 A for 40 acres, 320 B for 40 acres, and 320 C for 80 acres, to-wit: S. E. 1-4, S. W. 1-4 of 25, S. E. 1-4 of S. W. 1-4 of 24, and S. 1-2 of S. E. 1-4 of 24, 1 S., 3 W., said improvements consisting mainly in enclosing said tract by fencing the same with substantial posts and wire fence.

"Cecelia Demarais, by her duly authorized attorney, J. W. Henderson."

Then follows the jurat of the officer before whom the affidavit was executed on May 6, 1865.

August 31, 1865, the scrip was adjusted to the public survey to the S. E. 1-4 of S. W. 1-4 of 25, S. E. 1-4 of S. W. 1-4 of 24; and S. 1-2 of S. E. 1-4 of 24, 1 S., 3 W., Humboldt meridian.

Patent duly issued November 26, 1866.

Scrip 320 A and 320 C of the same party, located in the same way, the proofs being the same as in 320 B.

108 D, Josephine Laterville, R. & R. No. 4. Power of attorney August 6, 1864, to James W. enderson. Located the scrip on unsurveyed land on January 26, 1865.

"John A. Sims, attorney-in-fact for Peter Bouiere and Blue Hair Bouiere."

This is sworn and subscribed in the usual manner.

There is one more which I am told gives another phase, a specimen; not particular cases standing alone, but these are specimens of many cases.

R. & R. No. 137. Duluth, Minnesota.

Scrip No. 343 D, for 160 acres, issued to Joseph Coursalles, November 24, 1856.

Power of attorney from Joseph Coursalles to Benj. F. Bull, dated September 25, 1865.

Located by Benj. F. Bull, attorney, May 1, 1870. Lands described as in Tp. 54 N., R. 23 W. Changed to 55 N., 22 W.

Located on described lands in Tp. 55 N., R. 22 W., March 28, 1873.

Evidence of improvements:

Affidavit by John Martin, March 28, 1873, that he made personal examination of the land March 20, 1873, "and there was no person living on the same at that time, nor were there any im-

provements on it except those of Benjamin F. Bull, attorney-in-fact."

Whether there were any of those there deponent did not say.

Duluth, Minnesota. Joseph Campbell, location in section 31 and 32, of township 65, range 2 E.

Adaile Gammel, by her attorney-in-fact, offered her Sioux half-breed scrip, 188 A, March 18, 1874, for lot 4 of 32, 65, 2 E, the same being then unsurveyed.

On September 15, 1874, Campbell by his attorney-in-fact, offered his scrip for location upon said lot in connection with others in section 31. On October 7, 1876, the said attorney adjusted Campbell's location so as to include the said lot 4 of section 32.

A contest resulted between these two applicants, and a hearing held at the local office. From the testimony adduced it appeared that Gammel had made no improvements on the land, while Campbell had, prior to his location, purchased improvements of one McFarland, consisting of a house, and that McFarland occupied the house up to and subsequent to the location.

The local oficers, on September 22, 1877, upon this state of facts, held that as Gammel's location antedated that of Campbell that it should be pre-

"It is true the filing of Gammel was not strictly legal, that is, the law was not fully complied with, because there is no evidence of improvement

or formal acknowledgment of the filing by the then Register and Receiver of this office. But I think it is fair to presume that Gammel's attorney-in-fact, Hamilton, did all that was required of him by the Register and Receiver, and that those officers, not Hamilton, are really to blame for any omission, for they are supposed to know the requirements of the law, and it was certainly their duty to reject the application to file before all the requirements were complied with." (Secretary's circular of January 29, 1872; pp. 723, 724, Copp's Land Laws.)

The local officers therefore held that Campbell should not be allowed to include in his location the said lot 4 of 32 claimed under the Gammel location, and on October 19, 1877, the then Commissioner affirmed this decision of the Register and Receiver.

After this decision was rendered, Henry F. Masterson, attorney for Campbell, asked leave to amend his location so as to take in place of lot 4 of section 32, the N. E. 1-4 of S. W. 1-4 of 31, making in all 172-10 acres. On October 27, 1877, the Commisioner directed the local officers as follows:

You will call upon Mr. Masterson to write across the face of the application a correct description in red ink of the tracts he now desires to locate, and affix his signature thereto. Thereafter on receipt of the excess purchase money required

by law you will certify to the correctness of such location, and transmit the papers to this office. This was done and patent subsequently issued upon the location.

But I have already occupied more of the alloted time than is properly my due and must surrender the floor.

APPENDIX B.

Department of the Interior,

Washington, March 27, 1863.

Sir:

I now return to you the papers submitted with your report of the 20th inst. upon the appeal of S. A. Peugh, attorney, representing the title of Sophia Felix, from your decision of the 15th December, 1862, against the location made by her on the 21st November 1861, of her scrip No. 181 A. and No. 181 C. upon the N. 1-2 and S. E. 1-4 of the S. E. 1-4 of Sec. 9, Tp. 15 N., R. 13 E., Omaha district, Nebraska, and in favor of the pre-emption claim of M. W. Carroll, under a settlement commenced December 29, 1861.

The location of Felix is anterior to the pre-emption settlement and if valid should be patented. It is plain from the decision of this Department of July 30, 1862, and is conceded by your office, that the land was subject to location on the 21st No-

vember 1861, but you decide against the location for these reasons:

1st. Felix was not a resident upon the land and had no improvements thereon at or before the date of location.

2nd. That "the location of the scrip, although made in her name, was not made by her in person, nor by her guardian or duly authorized agent for her use and benefit, but by an unauthorized person, and for the use and benefit of a person having no legal interest therein."

The law under which Felix claims, is that of the 17th of July, 1854 (Stat., Vol. 10, p. 304), which provided for an exchange of lands with the Sioux half-breeds for the tract lying on the west side of Lake Pepin. Sophia Felix was one of the half-breeds, and received her scrip regularly through the officers of the Indian service;—and the law provides that such scrip "may be located upon any of the lands within said reservation not now occupied by actual and bona fide settlers of the half-breeds or mixed bloods or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements, etc."

The land located by Felix is not within the reservation—but it had been surveyed, and was

subject to pre-emption at the date of location, and was unoccupied by an adverse claimant. I therefore deem the location to be good. The law uses the disjunctive conjunction, in the paragraph quoted, and it is in the cases where unsurveyed lands are claimed by a half-breed that improvements are requisite as an antecedent to the right of location, and I therefore, do not regard your first objection to Felix's claim as sanctioned by the law.

As to your second objection, I remark that this kind of scrip is by the law, declared to be not assignable. In this case Sophia Felix has signed the application to locate her own scrip. The signature must be treated by us as genuine, when there is no proof to the contrary; and when she has made no complaint against this use of her scrip. The fact that the scrip was carried to the Land Office and the business transacted by another person, does not affect the validity of her entry of the land.

As the certificate of location issued in her name, and the patent will issue to her, neither the Register's report or the affidavit of third parties can be admitted to establish the interest of any other person in the location.

We could not recognize such interest if an assignment in writing was produced, and duly proved to have been executed by the half-breed—whether she could sell or did sell the land after the location of her scrip we need not inquire, and the validity and effect of any such sale or assignment

must be left to the arbitrament of the Courts of Law. The location is valid on its face, and the owner of the scrip, so far as she is represented at all, demands the patent to issue in her name, and my decision is that she is entitled thereto.

The subsequent and interfering claim of Carroll must be rejected. The Secretary of the Interior directs me to advise you of these conclusions of the Department in this case.

I am Sir, Very Respectfully,

Your Obedient Servant,

W. T. OTTO,
Assistant Secretary.

The Commissioner of the General Land Office.